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Supreme Court, U.S.
FILED
09-668 SEP 29 2009
OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

Philip W. Green,

Petitioner,

v.

Service Corporation International,

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Philip W. Green
Attorney Pro Se
4511 Riverside Oaks
Kingwood, TX 77345
(281) 360-1231

QUESTIONS PRESENTED

A) Did the court of appeals improperly apply federal substantive law instead of Texas general contract law?

B) Did the district court and court of appeals improperly apply presumptions favoring arbitration to find that an agreement between SCI and Green existed?

C) Was the agreement invalid because either:

   i) the agreement expired on January 1, 2003 when Green was terminated by Management, or,

   ii) the agreement was limited to disputes related to Green's employment with Management?

D) Does the Sarbanes-Oxley administrative process constitute a judicial process for purposes waiver of the right to arbitration?

E) Did Green suffer prejudice from SCI's delay in seeking arbitration?

LIST OF PARTIES

The parties to this proceeding are the same as the parties to the proceeding in the court of appeals for the fifth circuit, Petitioner Philip W. Green and Respondent Service Corporation International.

TABLE OF CONTENTS

Page

Questions Presented i
List of Parties ii
Table of Contents iii
Table of Cited Authorities v
Table of Appendices viii
Opinion Below 1
Statement of Jurisdiction 1
Constitutional and Statutory Provisions Involved 1
Statement of the Case 5
Reasons For Allowance Of The Writ 10

1. Review is necessary to more clearly delineate the circumstances in which a non-signatory may invoke the authority of the Federal Arbitration Act to compel a signatory to arbitrate a dispute 10
2. Review is necessary to resolve the nature of the dispute resolution process under the Sarbanes-Oxley Act of 2002 as being judicial or non-judicial in nature for purposes of finding waiver of the right to arbitration. 11
3. Review is necessary to consider the court of appeals decision not to publish this case under a local circuit rule that allows decisions based on "well settled law" not to be published. 13

Argument 15

A Did the court of appeals improperly apply federal substantive law instead of Texas general contract law? 15

B Did the district court and court of appeals improperly apply presumptions favoring arbitration to find that an agreement between SCI and Green existed? 17

C Was the agreement invalid? 22

1. The Process

Initial Burden of Proof 22

Intent of the Parties 24

The Arbitration Agreement 25

Why Were These Opinions Not Published? 28

2. Did the agreement expire on January 1, 2003 after Green was terminated by Management? 28

3. Was the agreement limited to disputes related to Green's employment with Management? 29

D Does the Sarbanes-Oxley administrative process constitute a judicial process for purposes waiver of the right to arbitration? 32

E Did Petitioner suffer prejudice from SCI's delay in seeking arbitration? 34

Conclusion 35

TABLE OF CITED AUTHORITIES

Arthur Andersen LLP v. Carlisle,
129 S. Ct. 1896 (2009).....11, 15
Coker v. Coker,
650 S.W.2d 391 (Tex. 1983).....20
EEOC v. Waffle House, Inc.,
534 U.S. 279 (2002).....17
FDIC v. Conn. Nat'l Bank,
916 F.2d 997 (5th Cir. 1990) 20
Fleetwood Enterpr., Inc. v. Gaskamp,
280 F.3d 1069 (5th Cir.2002) 18
General Guaranty Ins. Co. v. New Orleans General Agency, Inc.
427 F.2d 924 (5th Cir. 1970) 33
Hall v. Hall,
308 S.W.2d 12 (Tex.1957).....28, 29
In re Neutral Posture, Inc.,
135 S.W.3d 725, (Tex. App. - Houston [1st Dist.] 2003). 23,28
InterGen N.V. v. Grina,
344 F.3d 134 (1st Cir. 2003).....22
International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH,
206 F.3d 411 (4th Cir. 2000) 16
In re Palm Harbor Homes, Inc.,
129 S.W.3d 636 (Tex. App. - Houston [1st Dist.] 2003) 31

Kona Tech. Corp. v. S. Pac. Trans. Co.,
225 F.3d 595 (5th Cir. 2000). 21
McCarthy v. Azure,
22 F.3d 351 (1st Cir. 1994). 22
MCI Telecomm. Corp. v. Texas Util. Elec. Co.,
995 S.W.2d 647 (Tex.1999).....30
MJR Corporation v. B & B Vending Company,
760 S.W.2d 4 (Tex. App. - Dallas 1988) 30
Mitsubishi Motors Corp. v. Soler Chrysler
Plymouth,
473 U.S. 614 (1985).....18
Mohamed v. AutoNation,
89 S.W.3d 830 (Tex. App. – Houston [1st
Dist] 2002). 23
Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd.,
636 F.2d 51 (3rd Cir. 1980) 20, 21
Perry v. Thomas,
482 U.S. 483 (1987).....15
Prima Paint Corp. v. Flood & Conklin Mfg. Co.,
388 U.S. 395 18
Republic Ins. Co. v. Paico Receivables, LLC,
383 F.3d 341 (5th Cir. 2004) 33
S & H Supply Co. v. Hamilton,
418 S.W.2d 489 (Tex. 1967).....31
Steel Warehouse Co. v. Abalone Shipping
Ltd. Of Nicosai,
141 F.3d 234 (5th Cir. 1998). 33
Stine v. Stewart
80 S.W.3d 586 (Tex. 2002).....30

Subway Eqpt. Leasing Corp. v. Forte,
169 F.3d 324 (5th Cir. 1999) 32
WesternGeco, L.L.C. v. Input/Output, Inc.,
246 S.W.3d 776 (Tex. App.-Houston [14th
Dist.] 2008, no pet.) 24, 28
Washington. Mutual. Fin. Group, LLC v. Bailey,
364 F.3d 260 (5th Cir. 2004) 16

TABLE OF APPENDICES

	Page
Ex. A. The Arbitration Agreement	37
Ex. B. Order Denying Rehearing	45
Ex. C. Opinion of the Court of Appeals	46
Ex. D. Final Judgment of the District Court	54
Ex. E. Arbitrators' Award	56
Ex. F Opinion & Order Confirming Arbitration Award	108
Ex. G. Order Denying Motion to Reconsider	119
Ex. H. Order Compelling Arbitration	122

OPINION BELOW

Neither the court of appeals nor the district court published the decisions regarding this case. The appeals court cited its Rule 47.5.1 allowing non-publication of decisions that "involve well settled principles of law and impose needless expense on the public and burdens on the legal profession."

The opinion is attached as Exhibit C and may be found on the 5th Circuit's opinions website under docket no. 08-20607. The district court's final opinion is attached as Exhibit F at p. 108, and may be found on the Pacer website for the Southern district of Texas under Case 4:06-cv-00833

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution - Amendment 7 - Trial by Jury in Civil Cases.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Title 9 United States Code, §§ 2-4

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving

commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties,

for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding

thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Fifth Circuit Rule 47.5.1

47.5.1 Criteria for Publication. The publication of opinions that merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession. However, opinions that may in any way interest persons other than the parties to a case should be published.

(a) Establishes a new rule of law, alters, or modifies an existing rule of law, or calls attention to an existing rule of law that appears to have been generally overlooked;

(b) Applies an established rule of law to facts significantly different from those in previous published opinions applying the rule;

(c) Explains, criticizes, or reviews the history of existing decisional or enacted law;

(d) Creates or resolves a conflict of authority either within the circuit or between this circuit and another;

(e) Concerns or discusses a factual or legal issue of significant public interest; or

(f) Is rendered in a case that has been reviewed previously and its merits addressed by an opinion of the United States Supreme Court.

STATEMENT OF THE CASE

This is an action under the law of the United States known as the Sarbanes-Oxley Act of 2002, furnishing protection to employees against retaliation for reporting in good faith certain acts or omissions of a publicly traded corporation believed by the employee to be in violation of certain laws, in violation of Securities and Exchange Commission rules, or in fraud of its stockholders.

The jurisdiction of the district court was invoked in accordance with the provisions of 18 U.S.C. 1514A(b)(1), whistleblower protection for employees of publicly traded companies; 28 U.S.C. § 1331, federal question; 28 U.S.C. § 1337(a), regulation of commerce; 28 U.S.C. § 1343(4), civil rights, and 28 U.S.C. § 1367, supplemental jurisdiction.

FACTUAL BACKGROUND

The court of appeals affirmed the district court's ruling that Petitioner was bound to arbitrate, a dispute with the Respondent concerning alleged violations of the Public Company Accounting Reform and Investor Protection Act of 2002, commonly known as the Sarbanes-Oxley Act of 2002. Hereinafter, Respondent will be referred to as "SCI" and Petitioner will be referred to as "Green".

This determination was based on applying federal substantive law to a stand-alone arbitration agreement between Green and an unidentified party referred to as "the Company".

The agreement specified that 1) the "Company" was Green's employer, 2) SCI was not the "Company" 3) Green was an at-will employee of the

"Company". The agreement had no specified termination date. The agreement is attached as Exhibit A at p. 37.

On March 6, 2001, Green signed the agreement shortly after beginning employment with a subsidiary of SCI named SCI Management L.P., hereinafter referred to as "Management". On January 1, 2003, one year and nine months later, Green ceased employment with Management and began employment with a newly created subsidiary of SCI named SCI Funeral and Cemetery Purchasing Cooperative, Inc., hereinafter referred to as "COOP". Green did not sign a separate arbitration agreement with COOP. On June 17, 2005, approximately two years and six months later, Green's employment with COOP was terminated thereby leading to this dispute. At all times, Green was employed in Houston, Texas.

HISTORY OF THE CASE

OSHA Investigation

The claim was initially investigated by OSHA as required by regulations issued by the Secretary of Labor. OSHA dismissed Green's claim as untimely based solely on SCI's undocumented assertion that Green had been advised, in February of 2005, that he would be terminated at some point in the future. The OSHA investigator held that Green's claim arose in February 2005 and accordingly, Green's claim should have been filed in April 2005 under the 60 day time limit for filing under the regulations.

Green then requested a hearing before an administrative law judge.

District Court Proceedings

Initial Pleadings

Green then filed this action in federal court on March 13, 2006 after the required 180 day process before the Department of Labor expired without a final decision.

SCI responded to Green's original complaint by moving to compel arbitration based on the terms of the 2001 arbitration agreement.

Green opposed arbitration on the basis that there was no agreement to arbitrate between the parties to the dispute and. that SCI had waived its right to arbitration by participating in litigation before the Department of Labor

Order Compelling Arbitration

The district court granted SCI's Motion to Compel Arbitration on June 30, 2006. The district court first found that SCI had not waived arbitration by participating in the judicial process.

The district court found that Green had agreed to arbitrate the dispute by inferring that SCI was the "Company" in the agreement based on SCI's logo on the cover page. See Exhibit H Order Compelling Arbitration page 125.

Motion for Reconsideration

Green filed a Motion for Reconsideration on July 14, 2006 and again pointed out that the very terms

of the agreement specified that SCI was not the "Company".

After various motions by both parties, SCI then finally replied that in fact, the "Employer" was Management and accordingly was the "Company" referred to in the agreement.

Order Denying Motion To Reconsider

The district court then issued its ORDER DENYING MOTION TO RECONSIDER on August 17, 2006. The district court found that Green's employer was COOP, despite SCI's admission to the contrary, and that, regardless, the identity of the other party to the agreement was irrelevant since they were all affiliates of each other. See Exhibit G p.120.

First Appeal to the 5th Circuit Court of Appeals

Green then filed an interlocutory appeal of the decision, which was rejected on May 30, 2007 by the 5th Circuit Court of Appeals on the grounds of lack of jurisdiction.

Arbitration

Green and SCI then proceeded to arbitration in July 2007. On October 29, 2007, the arbitration panel found for SCI and rejected Green's position that the arbitration agreement was not between SCI and Green. See Exhibit E pp. 56-107.

Motion to Vacate the Arbitration Award

On January 25, 2008, Green filed a Motion to Vacate the Arbitration Award with the district court. On August 25, 2008, the district court denied the motion and affirmed the arbitrators' award.

Second Appeal to the 5th Circuit Court of Appeals

Green appealed to the court of appeals filing his initial brief on November 18, 2008. Oral arguments were held on April 27, 2009. On June 2, 2009, the court of appeals affirmed the district court. Green filed a request for rehearing on June 16, 2009, which was denied on July 1, 2009. The case has not been published under a special rule of the court of appeals. See Ex.C at p. 46.

The court of appeals assumed that Management is the "Company" based on SCI's and Green's apparent current agreement as to the identity of the "Company". The court of appeals held that by signing the agreement with Management that Green was required to arbitrate "certain specified" claims regardless of whether the claims were related to Green's employment with Management. The court of appeals found that the dispute fell within the scope of the agreement based on presumptions favoring arbitration. In footnote 2 of the opinion, the court of appeals held that since Green agreed to arbitrate with SCI, the court did not need to address Green's state law based arguments that he did not agree to arbitrate with SCI.

The court of appeals then addressed waiver. The court acknowledged the possibility that the Sarbanes-Oxley processes might be judicial in nature but stated that SCI's participation in the process did not constitute waiver. The court held that SCI's letter to Green demanding arbitration was sufficient without mentioning that SCI had never raised arbitration before the OSHA investigator or the Administrative law judge.

Further, the court of appeals denied that Green had suffered prejudice and had only generally referred to the passage of time, delay and expense involved.

Finally, the court of appeals declared that Green had raised new arguments in his brief and that those arguments were waived without specifying what those arguments were.

REASONS FOR ALLOWANCE OF THE WRIT

I) Review is necessary to more clearly delineate the circumstances in which a non-signatory may invoke the authority of the Federal Arbitration Act to compel a signatory to arbitrate a dispute.

This case presents unique issues concerning the enforceability of § 3 of the FAA by non-signatories. It concerns whether federal or state law determines if a non-signatory may enforce an arbitration agreement. It concerns the burden of proof required of a non-signatory to invoke § 3. It concerns the availability of presumptions favoring arbitration in meeting that burden of proof. It concerns the right to a jury trial in determining whether or not a valid contract to arbitrate exists. It concerns the ordinary rules for interpreting the meaning of contracts. It concerns the jurisdiction of arbitrators to review their own jurisdiction when allowed to do so by the agreement. It concerns the "chilling effect" that such decisions may have on other citizens who face the prospect of termination if they reveal what they know.

First, the court of appeals applied federal substantive law instead of general state contract law in deciding if the parties had agreed to arbitrate. The court of appeals used federal substantive law, without any explanation of how federal substantive law supports their holding. Then the court used that finding to justify disregarding Petitioner's state law based arguments that no agreement between the parties existed. The court of appeals refused a rehearing even after this Court's decision in Anderson v. Carlisle, 129 S. Ct. 1896 (2009), was published.

Next, the circuit court of appeals created the existence of an agreement between the parties to the dispute, by reaching over the specific arbitration definition provision, to reach a scope-expanding sentence and interpreted it in a fashion that contradicts the arbitration definition provision and is inconsistent with the rest of the agreement. Furthermore, without such an unjustified approach, the agreement, which was between an at-will employee and the employer, would have terminated on its own two years and six months before the dispute arose when the employee was terminated by the employer.

In effect, the court of appeals bootstrapped presumptions concerning the scope of the agreement into contract formation presumptions.

II) Review is necessary to resolve the nature of the dispute resolution process under the Sarbanes-Oxley Act of 2002 as being judicial or non-judicial in nature for purposes of finding waiver of the right to arbitration.

The district court held that such proceedings were not judicial in nature despite Petitioner's citation of several federal cases in other circuits to the contrary. The district court even applied presumptions favoring arbitration to resolve doubts as to whether the DOL procedures under Sarbanes-Oxley were judicial, and then found them to be administrative.

The court of appeals acknowledged that the administrative procedures might actually constitute judicial procedures; however, the court of appeals declined to reach the issue, without discussion, by finding that SCI's participation was minimal and therefore had not waived arbitration regardless of the nature of Sarbanes-Oxley procedures.

In this case, Green and SCI participated fully in the Department of Labor process. This process included every aspect of trial procedure as would normally take place in federal court.

As the 180 day deadline drew near and a hearing before an administrative law judge was scheduled, Green gave notice, as was his right by law, of his intention to pursue his claim in federal court.

SCI then demanded arbitration immediately after Green filed his Original Complaint in federal court and demanded a jury trial.

This Court should consider whether the nature of the Department of Labor dispute resolution procedures under Sarbanes-Oxley constitutes a judicial process for purposes of waiver of a right to arbitration and whether a party's failure to seek

arbitration during the Department of Labor process up to just a few days before trial constitutes a waiver of any right to arbitration.

III) Review is necessary to consider the court of appeals decision not to publish this case under a local circuit rule that allows decisions based on "*well settled law*" not to be published.

The facts in this case clearly demonstrate that the issues involved are not well settled law and that the decision would interest other parties. The agreement did not identify the name of the other party to the agreement. SCI was not a party to the agreement. The agreement limited arbitration to disputes related to the employment relationship between the parties to the agreement. The agreement had no specified termination date. The employment relationship between the parties to the agreement terminated two and one-half years before the dispute in this case arose. State law limits the application of third-party beneficiary status to creditor beneficiaries. State law provides that ambiguities are to be interpreted against the drafter of the agreement. The parties to the dispute went through the dispute resolution process of the Department of Labor for Sarbanes-Oxley claims that have been held to be judicial in nature in other circuits.

This Court should consider whether circuit courts should be permitted to bury decisions that are not well reasoned without having an independent review of those decisions prior to releasing the decision to the parties. Otherwise, a poorly reasoned decision can escape the light of

adequate review leading to deprivation of constitutional rights with the only recourse being the unlikely review by this Court. Without the review of such decisions it may even be possible for such judges to obtain higher office.

Not only do private citizens experiencing the judicial process first hand need to believe that their rights can be trusted to the federal court system but the public in general needs to believe that judges who may be candidates for higher office can be trusted and that their decisions can withstand the spotlight of public disclosure.

ARGUMENT

This case is entirely based on issues regarding contract formation or in the alternative waiver. Who did Green agree to arbitrate with, what did he agree to arbitrate and did the agreement expire when the other party to the agreement terminated Green's employment long before the dispute in this case arose?

A) Did the court of appeals improperly apply federal substantive law instead of Texas general contract law?

This Court has made it clear that whether a non-party can compel arbitration is a simple straightforward issue of contract interpretation as to whether the arbitration provision inures to the benefit of the non-signatory and may be considered to cover the dispute, in light of the surrounding circumstances. See Perry v. Thomas, 482 U.S. 483, 492 (1987).

This principle was recently reinforced by this Court in Andersen v. Carlisle, supra. This Court held in no uncertain terms that "a litigant who was not a party to the relevant arbitration agreement may invoke 9 U.S.C. §3 only if the relevant state contract law allows him to enforce the agreement."

In this case, the court of appeals agreed with the district court that Green was bound to arbitrate the dispute with SCI because "The Agreement provides that Green agreed to arbitrate certain specified claims against SCI Management, its affiliates, and

their respective officers, directors, employees, and agents.1" See Court of Appeals Opinion at p. 46.

Footnote 1 states that the appeals court was applying "federal substantive law" in making this determination citing Wash. Mut. Fin. Group, LLC v. Bailey, 364 F.3d 260, 267 n.6 (5th Cir. 2004).

The rationale in footnote 6 of Washington Mutual is inapplicable in this case. Washington Mutual concerned various plaintiffs objecting to arbitration. The court of appeals divided those plaintiffs into two categories. The first category, described as "the Illiterates", consisted of plaintiffs who had signed the arbitration agreement but were opposing arbitration based on unconscionability due to their illiteracy. The second category consisted of one plaintiff who had not signed an arbitration agreement. *Id* at 262.

The court of appeals in Washington Mutual clearly applied state law to the first category, *Id* at 264. Regarding the plaintiff in the second category, Miriah Phinizee, the court stated that the issue was whether she was bound under ordinary contract law principles. *Id* at 267. The court stated that Washington Mutual was asserting the doctrine of equitable estoppel to compel Ms. Phinizee to arbitrate. Id. The court discussed the application of the estoppel doctrine by numerous federal courts to which they attached footnote 6 as a reference. *Id.*

In footnote 6, the court of appeals cited the logic in International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 417-18 (4th Cir. 2000) as support for applying federal law in non-signatory cases. The court of appeals quoted

International Paper stating that the determination of whether a non-signatory is bound by an arbitration provision "presents no state law question of contract formation or validity". *Id.*

Footnote 6 is irrelevant to this case because instead of binding a non-signatory, this case attempts to bind a signatory. This case is clearly about contract formation or validity. There is no need to apply equitable estoppel in this case. Green is not denying that he signed the arbitration agreement but he is denying that he agreed to arbitrate with SCI or that SCI is entitled to enforce the agreement under any legal theory.

There is no underlying contract that Green is trying to enforce. Green's claim is based on a federal statute not contract. Nor is Green's claim against SCI intertwined with or based on the same operative facts of any agreement.

As shown above, there is no doubt that ordinary state contract law governs whether an arbitration agreement is valid. Yet the court of appeals chose the integument of federal substantive law to deprive an ordinary citizen of his constitutional rights.

B) Did the district court and court of appeals improperly apply presumptions favoring arbitration to find that an agreement between SCI and Green existed?

It is only after the establishment of a valid and enforceable agreement to arbitrate that state and federal policies favoring arbitration become applicable. EEOC v. Waffle House, Inc., 534 U.S. 279, 294, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002);

Fleetwood Enterpr., Inc. v. Gaskamp, 280 F.3d 1069, 1074 (5th Cir.2002). The purpose of the Federal Arbitration Act is "to make arbitration agreements as enforceable as other contracts, but not more so." Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n. 12, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967); see also Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, 473 U.S. 614, 625-26, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985); Waffle House, 534 U.S. at 294, 122 S.Ct. 754.

The arbitration clause in the agreement consisted of two sentences. The question before the Court regards the function of the second sentence in the agreement. Does the sentence constitute an operative provision establishing an agreement between Green and SCI, or is it a provision regarding the scope of the agreement?

The first sentence of the arbitration clause clearly stated that the parties to the agreement were agreeing to arbitrate disputes related to the employment of the Employee with the Company.

> "Employee and the Company agree that, except for the matters identified in Section 2 below and except as otherwise provided by law, all disputes relating to any aspect of Employee's employment with the Company shall be resolved by binding arbitration." (emphasis added)

The second sentence that SCI, the district court, the arbitrators, and the court of appeals focused on, elaborated on this to include claims against affiliates among others.

> "This includes, but is not limited to, any claims against the Company, its affiliates or their respective officers, directors, employees, or agents for breach of contract, wrongful discharge, discrimination, harassment, defamation, misrepresentation, and emotional distress, as well as any disputes pertaining to the meaning or effect of the Agreement."

What does the second sentence mean? Is the second sentence elaborating on the kind of disputes that are included within the meaning of the word "disputes" in the first sentence or is it adding a new class of arbitrable disputes to those arbitrable disputes already defined in the first sentence?

If the second sentence is just elaborating on the kinds of disputes that are included within the meaning of the word "disputes" in the first sentence, then clearly, those disputes referred to in the second sentence are subject to the limitation to "disputes relating to any aspect of Employee's employment with the Company" in the first sentence. If the second sentence is merely clarifying the meaning of the word "disputes" in the first sentence then the second sentence does not change the nature of the agreement as defined in the first sentence at all.

So for example, is the second sentence saying that if the Employee has some dispute relating to his employment with the Company and as part of that dispute he has a claim against an affiliate, or an employee, then that claim against the affiliate, or employee, is arbitrable as well?

On the other hand, is the second sentence saying that arbitrable disputes include both 1) disputes "relating to any aspect of Employee's employment with the Company" and 2) disputes not "relating to any aspect of Employee's employment with the Company" but that involve entities with some relationship to the "Company"?

The interpretation that the second sentence is merely elaborating on or clarifying the meaning of the word "disputes" and not adding a new class of arbitrable disputes seems the more reasonable interpretation, given that the entire stated purpose of the document was to govern the employment relationship between the "Employee" and the "Company".

"The district court, when considering a motion to compel arbitration which is opposed on the ground that no agreement to arbitrate had been made between the parties, should give to the opposing party the benefit of all reasonable doubts and inferences that may arise." See Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd., 636 F.2d 51, 54 (3rd Cir. 1980)

Under Texas contract law, a court construing a contract must read that contract in a manner that confers meaning to all of its terms, rendering the contract's terms consistent with one another. See FDIC v. Conn. Nat'l Bank, 916 F.2d 997, 1001 (5th Cir. 1990); Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983).

In doing so, "courts should examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that

none will be rendered meaningless. No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument.... In harmonizing these provisions, terms stated earlier in an agreement must be favored over subsequent terms". Par-Knit Mills at 54.

Texas law requires courts to "peruse the complete document to understand, harmonize, and effectuate all its provisions." See Kona Tech. Corp. v. S. Pac. Trans. Co., 225 F.3d 595, 610 (5th Cir. 2000).

Is Green now bound to arbitrate disputes with other employees regardless of whether they relate to Green's employment with the "Company"? Would those disputes be limited to the kinds of disputes listed in the second sentence or would the phrase "but not limited to" in the second sentence expand those arbitrable disputes to injuries in a car accident as well? What if Green quit working for the "Company" and began employment with a former agent of the "Company" and was subsequently wrongfully discharged? Suppose a director of the Company gets intoxicated and crashes through the front of Green's home. Is Green obligated to arbitrate claims for physical injuries or emotional distress from that incident as well? Obviously, these examples are absurd. Surely no rational court would find that Green is obligated to arbitrate in such circumstances.

It is inescapable that the district court, the arbitrators and the court of appeals all confused questions about the scope of the agreement with

questions about the existence of an agreement and then applied doubts as to the scope to justify using presumptions favoring arbitration to find that an agreement to arbitrate existed in the first place.

It is well settled that presumptions favoring arbitration only go to the scope of an arbitration agreement.

Curiously, the terms of the agreement that the court of appeals addressed in determining the scope of the agreement were the very same terms that the court looked to in deciding that an agreement existed in the first place. This kind of logic seems suspiciously circular.

The result of the district court's and court of appeals' finding that the second sentence acts as an operative arbitration obligation between Green and SCI is in effect "bootstrapping" the determination of the existence of an agreement by subtle application of presumptions favoring arbitration to a question of scope of the agreement.

C) Was the agreement invalid

1. The Process

Initial Burden Of Proof

The party seeking to compel arbitration has the initial burden of proving that a valid agreement exists. See InterGen N.V. v. Grina, 344 F.3d 134, 142 (1st Cir. 2003). In addition, the federal policy favoring arbitration does not apply in making this determination. *Id* at 150. Furthermore, presumptions favoring arbitration do not apply where the identity of the parties is unclear. McCarthy v. Azure, 22 F.3d 351, 355 (1st Cir. 1994).

Under the Federal Arbitration Act ("FAA"), a party seeking to compel arbitration has the initial burden to establish the arbitration agreement's existence and to show that the claims asserted fall within the agreement's scope. See In re Neutral Posture, Inc., 135 S.W.3d 725, 728, (Tex. App. - Houston [1st Dist.] 2003).

Under Texas law, proving that a valid arbitration agreement exists includes proving that the entity seeking to enforce the agreement is a party to the agreement or had the right to enforce the agreement not withstanding that it is not a party. See Mohamed v. AutoNation, 89 S.W.3d 830 (Tex. App. – Houston [1st Dist] 2002).

The district court chose to accept SCI's presentation of a document that Green signed but that did not identify the other party to the agreement as proof that a valid agreement existed.

The district court satisfied SCI's burden on its own by "inferring" the identity of the other party to the agreement to be SCI based on a "logo" on the cover page, as the district court stated, "in favor of creating a binding arbitration agreement". See Exhibit H ORDER COMPELING ARBITRATION at p. 125. See Exhibit F OPINION & ORDER CONFIRMING ARBITRATION AWARD at p. 116

This "inference" was inappropriate given that the agreement itself specifically excluded SCI as the other party to the agreement and Green's presentment of his employment offer letter that he had received from SCI Management L.P. that also bore SCI's logo on its letterhead.

SCI avoided identifying the "Company" and instead identified COOP as the "employer" who terminated Green. Green replied that COOP didn't even exist when the agreement was signed and can't possibly be the "Company". See WesternGeco, L.L.C. v. Input/Output, Inc., 246 S.W.3d 776, 786 (Tex. App.-Houston [14th Dist.] 2008, no pet.)

Five months after seeking to compel arbitration in March 2006, SCI finally admitted on August 10, 2006, that Management was the other party and that Green's at-will employment with Management had ceased two and one-half years before the dispute arose. A week later the district court denied Green's Motion for Reconsideration and did not even acknowledge SCI's admission that Management was the other party to the agreement.

Green insisted that the agreement clearly states that arbitrable disputes are limited to disputes relating to Green's employment with the "Company". Green merely wonders who the "Company" is. The district court replied that Green knows who the other party to the agreement is and whoever the "Company" is, they are an affiliate of SCI and are therefore entitled to enforce the agreement.

Intent of the Parties

What was the intent of the parties to the agreement in this case? Was the intent of the agreement to arbitrate disputes related solely to the employment relationship between the parties? Or was the intent for Green to arbitrate disputes with any entity connected to Management in any fashion

for whatever reasons? How long was this agreement to arbitrate going to last?

The Arbitration Agreement

The agreement, see p. 38, begins with "Your employer, identified below (the 'Company')" and is then followed by a list of values of the "Company".

After acknowledging that disputes can arise from time to time, the agreement states that employment related disputes will be resolved by arbitration for the sake of efficiency.

The agreement then lists the following four procedures regarding arbitration: (see pp. 40-41)

1. Matters Subject To Arbitration
2. Exclusions
3. Notice/Timeliness of Claims
4. Legal Counsel/Costs

Having just stated that the procedures are intended to resolve employment related disputes, the first procedure entitled "Matters Subject to Arbitration" clearly states in the very first sentence that the agreement to arbitrate is 1) between the Employee and the Company, and 2) the Employee and the Company are agreeing to arbitrate disputes relating to any aspect of Employee's employment with the Company.

That the parties intended arbitrable disputes to be limited to disputes between Green and Management is clearly laid out in the Notice to Employee provision:

BY SIGNING THIS AGREEMENT, YOU ARE AGREEING TO HAVE ANY AND ALL DISPUTES BETWEEN YOU AND YOUR COMPANY (EXCEPT THOSE SPECIFICALLY EXCLUDED IN SECTION 2 ABOVE AND THOSE EXCLUDED BY APPLICABLE LAW, IF ANY) DECIDED BY BINDING ARBITRATION AND YOU ARE WAIVING YOUR RIGHT TO A JURY OR COURT TRIAL. (see p.41 emphasis added).

In bold typeface, in all caps, the Affirmation Of At-Will Employment Status provision clearly demonstrates that the agreement was restricted to Green and Management.

The final sentence of the arbitration agreement, see p. 42, reads,

> "I have read the above, am familiar with its terms and agree that my relationship with my employer shall be governed thereby."

If the intent of the parties was to arbitrate disputes related solely to the employment relationship between the parties then the inclusion of claims against affiliates, directors, employees and agents seems reasonable. If these entities were acting on Management's behalf then it seems reasonable that Management would have some obligation to defend them against any liability that they might incur due to such activity. Such intent can be rationalized in part based on the employment related nature of the claims listed in the second sentence of the arbitration clause. Logically, the words "but not limited to" seem to mean that any

other employment related claims against entities that were acting on Management's behalf would also be included.

On the other hand, how does one rationalize the intent to arbitrate claims against anyone remotely connected with Management regardless of whether the claim was related to the employment relationship between Green and Management?

Green had no obvious motive to be so beneficent since he was getting nothing in return despite any illusory promise by Management to arbitrate. If the nature of any claim against such entities was not related to Green's employment with Management, what about any counterclaims that they might have against Green? Would those entities be obligated to arbitrate those claims as well? Could Green argue that those entities were estopped from avoiding arbitration? On what basis could Green assert estoppel? The obvious answer is no, because those entities had not agreed to anything and were not bound by the agreement.

How can Green enforce his constitutional right to a jury trial if he is injured in an auto accident by an intoxicated employee or agent of Management? If the second sentence creates a duty to arbitrate with those entities, then any doubts as to the scope of the agreement must be resolved in favor of arbitration and Green again is compelled to arbitrate.

If it can be held that simply by virtue of having someone's name or position listed, in a vague and expansive clause starting with "This includes", that such a person or entity can do anything to Green and know that Green will have to arbitrate, then

Green is truly helpless. When is he ever free of this cross of judicial presumptions?

Why Were These Opinions Not Published?

Can anyone possibly believe that the reason that neither the district court nor the appeals court published these absurd opinions is because they felt that this case involved well settled law and would not interest anyone else? See 5th Circuit Rule 47.5.1.

2. **Did the agreement expire on January 1, 2003 after Green was terminated by Management, or**

This dispute arose on June 17, 2005 when Green was terminated by COOP. However, the agreement was between Green and Management. The agreement makes it clear that Green was an at-will employee and could be terminated for any reason at all.

The question then arises as to whether the agreement to arbitrate terminated when the employment relationship terminated. If it did, then no agreement exists and Green cannot be forced to arbitrate under a non-existent contract. In Re Neutral Posture Inc., at 728.

Texas law generally holds that when a contract has no specified expiration period then the contract continues for a reasonable period of time. See WesternGeco, L.L.C. v. Input/Output, Inc., at 783-784. citing Hall v. Hall, 308 S.W.2d 12, 16 (Tex.1957).

If a reasonable time is implied, the determination of what is a reasonable time is

generally a question of fact that is based on the circumstances surrounding the adoption of the agreement, the situation of the parties when they entered into the agreement, and the subject matter of the agreement. *Id.* at 788 citing Hall, 308 S.W.2d at 16-17.

In the context of this case, an arbitration agreement between an at-will employee and his employer, the obligation to arbitrate disputes terminates when the employer terminates the employee.

Green has always argued that SCI's interpretation of the agreement constituted an open ended arbitration agreement binding Green to arbitrate with anyone who ever had any kind of relationship with SCI. When does Green's obligation to SCI end?

3. **Was the agreement limited to disputes related to Green's employment with Management?**

Assuming, for sake of argument, that the agreement did not expire on December 31, 2002 would SCI still be entitled to arbitration?

Texas law allows non-signatories to compel signatories to arbitrate under various principles including estoppel and third-party beneficiary. SCI first claimed to be a party to the agreement, which it clearly is not. Estoppel does not apply since Green's claim is not based on contract.

Texas law regarding enforcement of arbitration agreements by third party beneficiaries is well settled. The most recent case discussing this issue

is Stine v. Stewart, 80 S.W.3d 586 (Tex. 2002). In that case, the Texas Supreme Court laid down various principles to establish third-party beneficiary status. The Texas Supreme Court had established most of these principles previously in an earlier case. See MCI Telecomm. Corp. v. Texas Util. Elec. Co., 995 S.W.2d 647 (Tex.1999).

The Texas Supreme Court stated that the contracting parties must have entered into the contract directly for the third party's benefit. This intent must be clear and a court will not create a third-party beneficiary contract by implication. To determine the parties' intent, courts must examine the entire agreement when interpreting a contract and give effect to all the contract's provisions so that none are rendered meaningless. See Stine v. Stewart at 589.

To qualify as an intended third-party beneficiary, a party must show that it is either a "donee" or "creditor" beneficiary of the contract. *Id* at 589. An agreement benefits a donee beneficiary if, under the contract, the performance promised will, when rendered, come to him as a pure donation. Since this was a business transaction, there is no basis to find that SCI is a donee beneficiary. See MJR Corporation v. B & B Vending Company, 760 S.W.2d 4, 11 (Tex. App. - Dallas 1988). In contrast, an agreement benefits a creditor beneficiary if, under the agreement, that performance will come to him in satisfaction of a legal duty owed to him by the promisee. This duty may be indebtedness, a contractual obligation or other legally enforceable commitment owed to the third party. MCI Telecomm. Corp at 589.

Such a legal duty does not have to be a present duty and can arise in the future, but there is no indication that any claim that Green would have against the other party to the agreement would have created a legal duty owed from that party to SCI.

In Texas, a party is presumed to contract only for its own benefit; thus, any intent to benefit a third party must be clearly apparent. *Id* at 652. There is a presumption against, not in favor of, third-party beneficiary agreements. *Id* at 652. The focus is on whether the contracting parties intended, at least in part, to discharge an obligation owed to the third party. *Id* at 591

In this case there is no indication whatsoever that SCI Management L.P. owed SCI any legal duty such as indebtedness, contractual obligation or other legally enforceable commitment. However, neither the district court nor the court of appeals required any evidence that SCI was entitled to enforce the agreement as a third party beneficiary under Texas law.

A third-party beneficiary stands in the shoes of the contracting party and is subject to all the provisions of the contract. In re Palm Harbor Homes, Inc., 129 S.W.3d 636, 646 (Tex. App. - Houston [1st Dist.] 2003). See also S & H Supply Co. v. Hamilton, 418 S.W.2d 489, 493 (Tex. 1967).

Assume, for the sake of argument, that SCI met the other tests to be considered an intended third party beneficiary of the agreement and entitled to enforce it. In that case whose rights is SCI attempting to enforce.

It cannot be that of Management. Green has no claim against Management. Green's employment with Management terminated two and one-half years before the dispute in this case arose. Nothing in this case is related to Green's employment with Management. Management has no rights to compel arbitration with Green because there are no disputes between Management and Green.

D) Does the Sarbanes-Oxley administrative process constitute a judicial process for purposes waiver of the right to arbitration?

A party waives arbitration by engaging in overt acts that evinces a desire to resolve an arguably arbitrable dispute through litigation, rather than arbitration. Subway Eqpt. Leasing Corp. v. Forte, 169 F.3d 324, 329 (5th Cir. 1999).

In his original opposition to SCI's Motion to Compel arbitration, Green demonstrated that SCI participated in litigation before a Department of Labor Administrative Judge through the entire process of discovery and pre-hearing proceedings until the eve of a hearing, when Green elected to proceed in district court. Attached to Green's opposition were a number of the many submissions of the parties in the Department of Labor proceedings.

There was much more than "minimal" activity by SCI and. Green. Those activities were indistinguishable from the judicial process, and included conferences with a judge, discovery including depositions, identification of witnesses and exhibits, and preparation of pre-hearing submissions.

In this case, both parties conducted all the discovery they deemed necessary for proceeding with an adversary hearing, and the judge issued a protective order and orders related to the hearing. In fact, Green and SCI engaged in all activities before the Administrative Judge, save the actual hearing. To characterize those activities as "minimal" would be clear error.

The participation by SCI in the discovery process before the administrative law judge was not limited to responding to Green's discovery. SCI initiated discovery prior to Mr. Green. There is a clear distinction between participating only by responding to discovery and demanding discovery of the opposing party, See Steel Warehouse Co. v. Abalone Shipping Ltd. Of Nicosai, 141 F.3d 234, 238 (5th Cir. 1998).

SCI did not even attempt to enforce any right to arbitration during the administrative proceedings. Even when a party has done so, there is a waiver if the actions in the legal forum are inconsistent with the right to arbitrate. General Guaranty Ins. Co. v. New Orleans General Agency, Inc., 427 F.2d 924, 929 (5th Cir. 1970). In Republic Ins. Co. v. Paico Receivables, LLC, 383 F.3d 341, 344-47 (5th Cir. 2004) a party waived arbitration by waiting until days before trial was scheduled to begin before demanding arbitration. In this case, SCI did not object at all, and the parties would have proceeded with an administrative law judge hearing were it not for Green's proper exercise of his rights to file suit in this court. Even after Green gave the required notice of his intent to file a federal lawsuit, SCI did not raise the issue of arbitration.

E) Did Petitioner suffer prejudice from SCI's delay in seeking arbitration?

Green originally retained counsel to represent him at a flat fee that covered all services other than a lawsuit and would have covered services in arbitration or the Department of Labor proceedings. The matter continued before the Department of Labor until Mr. Green was required to exercise his right to proceed in federal district court after the period prescribed for administrative resolution had expired. To exercise his right to a judicial forum, Green suffered a substantial increase in attorney's fees resulting in well over $200 thousand in legal fees.

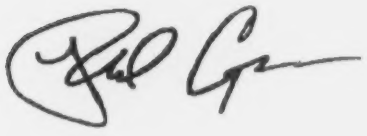
Only after Green exercised that right and incurred a significant increase in legal fees did SCI attempt to compel arbitration. Accordingly, SCI's delay caused Green to suffer substantial prejudice.

Finally, having endured SCI's relentless unjustified demands for arbitration, Green could no longer afford legal counsel and has been forced to represent himself since the end of arbitration.

CONCLUSION

For the reasons stated above, this Court should reverse the ruling of the court of appeals and remand with instructions that this case should proceed to trial.

Respectfully submitted on September 29, 2009.



Philip W. Green
Attorney Pro-Se

Appendices

	Page
Ex. A. The Arbitration Agreement	37
Ex. B. Order Denying Rehearing	45
Ex. C. Opinion of the Court of Appeals	46
Ex. D. Final Judgment of the District Court	54
Ex. E. Arbitrators' Award	56
Ex. F Opinion & Order Confirming Arbitration Award	108
Ex. G. Order Denying Motion to Reconsider	119
Ex. H. Order Compelling Arbitration	122

37

Principles of Employment & Arbitration Procedures

Principles of Employment

Your employer, identified below (the "Company"), recognizes that its employees are its most valuable assets and are vital to its success. We also recognize the importance of treating our employees with the utmost dignity and respect. We believe in the principles of honesty, fairness and respect for individual freedoms, and are committed to upholding the highest standards of professionalism and integrity in our operations. For these reasons, we have adopted certain policies governing workplace conduct. The Company is committed to strict compliance with these policies and asks all of its employees to agree to abide by these policies as well. A recap of some of these policies (which are more fully described in the Company's Employee Handbook) follows:

- We are an equal opportunity employer. Discrimination based upon an individual's race, color, religion, national origin, gender, age or disability will not be permitted or tolerated.
- Our policy against harassment, including sexual harassment was designed to provide a comfortable and professional working environment for everyone. It prohibits harassment of any kind in our workplace, especially if it is based upon the factors listed above.
- Our Problem Solving Procedure gives you the right to discuss any work-related problems with management and expect a timely and reasonable response. In the event that you are

not satisfied with that response, you have the right to appeal to successively higher levels of management, up to the President of the Company.

- We prohibit retaliation against any employee for exercising his/her rights under company policy or the law. Employees who feel that they are being retaliated against should bring their concern to management's attention immediately for prompt action.
- We are committed to maintaining a safe, healthful and productive working environment for all of our employees. In keeping with that goal, we have adopted a strict policy prohibiting the use, possession or sale of alcohol or illegal drugs while on Company property, on Company business or while operating a Company-owned vehicle. We have also adopted a policy prohibiting weapons in the workplace.
- We have established an Employee Assistance Program, which provides a confidential counseling and referral service designed to help you and your family deal with various personal problems. Also, in the interest of promoting better communication between the Company and its employees, and to facilitate the identification and resolution of workplace problems, we have established a confidential, toll-free telephone number (800-455-1140) to allow employees to express any concerns they have pertaining to workplace issues.

The purpose of the above policies is to assure fair, safe and pleasant working conditions for all of

the Company's employees. However, we recognize that disputes may arise from time to time, which must be resolved in a fair and efficient manner. In order to ensure equitable, efficient and cost-effective resolution of these matters, employment-related disputes (other than those specifically excluded below) will be resolved by arbitration, in accordance with the following procedures:

1. Matters Subject To Arbitration. Employee and the Company agree that, except for the matters identified in Section 2 below and except as otherwise provided by law, all disputes relating to any aspect of Employee's employment with the Company shall be resolved by binding arbitration. This includes, but is not limited to, any claims against the Company, its affiliates or their respective officers, directors, employees, or agents for breach of contract, wrongful discharge, discrimination, harassment, defamation, misrepresentation, and emotional distress, as well as any disputes pertaining to the meaning or effect of this Agreement. The arbitration shall be conducted in accordance with the procedures attached hereto as Exhibit "A." This agreement to arbitrate shall cover disputes arising both before and after the execution of this document, except to the extent that any litigation has already been filed as of the date hereof.

2. Exclusions. It is expressly agreed and understood that this Agreement shall not govern claims for workers' compensation or unemployment benefits, or claims brought to enforce any noncompetition or confidentiality agreement which may exist between the parties.

3. Notification/Timeliness Of Claims. Any claim which either party has against the other must be presented in writing by the claiming party to the other within one year of the date the claiming party knew or should have known of the facts giving rise to the claim. Otherwise, the claim shall be deemed waived and forever barred even if there is a federal or state statute of limitations which would have given more time to pursue the claim.

4. Legal Counsel/Costs. Each party may retain legal counsel and shall pay its own costs and attorneys' fees, regardless of the outcome of the arbitration; provided however, that the arbitrator may award attorneys' fees to the prevailing party when expressly authorized by statute to do so. All other costs pertaining to the arbitration shall be paid by the Company.

NOTICE TO EMPLOYEE: BY SIGNING THIS AGREEMENT, YOU ARE AGREEING TO HAVE ANY AND ALL DISPUTES BETWEEN YOU AND YOUR COMPANY (EXCEPT THOSE SPECIFICALLY EXCLUDED IN SECTION 2 ABOVE AND THOSE OTHERWISE EXCLUDED BY APPLICABLE LAW, IF ANY) DECIDED BY BINDING ARBITRATION AND YOU ARE WAIVING YOUR RIGHT TO A JURY OR COURT TRIAL.

AFFIRMATION OF AT-WILL EMPLOYMENT STATUS. THE PARTIES ACKNOWLEDGE AND AGREE THAT, UNLESS THEY ARE PARTIES TO A WRITTEN EMPLOYMENT AGREEMENT WHICH GUARANTEES EMPLOYMENT FOR A

DEFINITE PERIOD OF TIME, EMPLOYEE IS AN EMPLOYEE TERMINABLE AT-WIIL, AND THAT THE COMPANY MAY ALTER THE TERMS OF, OR TERMINATE EMPLOYEE'S EMPLOYMENT IN ITS SOLE DISCRETION, FOR ANY REASON OR NO REASON. EMPLOYEE FURTHER ACKNOWLEDGES THAT HE/SHE IS EMPLOYED BY THE COMPANY IDENTIFIED BELOW AND NOT BY SUCH COMPANY'S ULTIMATE PARENT COMPANY, SERVICE CORPORATION INTERNATIONAL, OR ANY OTHER AFFILIATE OF THE COMPANY.

MODIFICATIONS. NEITHER EMPLOYEE'S AT-WIIL STATUS NOR ANY OF THE ABOVE PROVISIONS PERTAINING TO ARBITRATION MAY BE MODIFIED EXCEPT BY A WRITTEN AGREEMENT SIGNED BY BOTH EMPLOYEE AND THE COMPANY.

I have read the above, am familiar with its terms and agree that my relationship with my employer shall be governed thereby.

EMPLOYEE:	COMPANY:
Signature: s/	Signature: s/
Print Name:Phil Green	Print Name:Carol Prescott
Date:3/6/01	Title:Manager /Human Resources
	Date:3/6/01

EXHIBIT "A"
ARBITRATION PROCEDURES

1. Selection of Arbitrator. An arbitrator shall be selected by mutual agreement of the parties. If the parties are unable to agree on a single arbitrator, each party shall select one arbitrator, and the two arbitrators so selected shall select a third arbitrator. The three arbitrators so selected will then hear and decide the matter.

2. Qualification of Arbitrators. All arbitrators must be attorneys, judges or retired judges who are licensed to practice law in the state where the Employee is or most recently was employed by the Company.

3. Location of Arbitration Proceedings. The arbitration proceedings shall be conducted within the county in which Employee is or most recently was employed by the Company or at another mutually agreeable location.

4. Procedural Rules. Except as otherwise provided herein, the arbitration proceedings shall be conducted in accordance with the statutes, rules or regulations governing arbitrations in the state in which Employee is or most recently was employed by Employer. In the absence of such statutes, rules or regulations, the arbitration proceedings shall be conducted in accordance with the employment arbitration Rules of the American Arbitration Association ("AAA"); provided however, that the foregoing reference to the AAA rules shall not be deemed to require any filing with that organization, nor any direct involvement of that

organization. In the event of any inconsistency between this Agreement and the statutes, rules or regulations to be applied pursuant to this paragraph, the terms of this Agreement shall apply.

5. Award. The arbitrator(s) shall issue a written award, which shall contain, at a minimum, the names of the parties, a summary of the issues in controversy, and a description of the award issued. Upon motion to a court of competent jurisdiction, either party may obtain a judgment or decree in conformity with the arbitration award, and said award shall be enforced as any other judgment or decree.

6. Applicable Law. In resolving claims governed by this agreement, the arbitrator shall apply the laws of the state in which the Employee is or most recently was employed by the Company, and/or federal law, if applicable.

7. Confidentiality. The parties agree and acknowledge that any arbitration proceedings between them, and the outcome of such proceedings, shall be kept strictly confidential; provided however, that the Company may disclose such information to the extent required by law and to its employees, agents and professional advisors who have a legitimate need to know such information, and the Employee may disclose such information (1) to the extent required by law, (2) to the extent that the Employee is required to disclose same to professional persons assisting Employee in preparing tax returns, and (3) to Employee's legal counsel.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08 – 20607

U.S. COURT OF APPEALS
FILED
July 1, 2009
Charles R. Fulbruge III
Clerk

PHILLIP W. GREEN
Plaintiff - Appellant

v.

SERVICE CORPORATION INTERNATIONAL
Defendant - Appellee

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

Before JONES, Chief Judge, ELROD, Circuit Judge, and GUIROLA, * District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

s/ Jennifer W. Elrod
United States Circuit Judge

* District Judge of the Southern District of Mississippi, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals Fifth Circuit
Filed
June 2, 2009
Charles R. Fulbruge III
Clerk

No. 08-20607

PHILIP W. GREEN,

Plaintiff-Appellant

v.

SERVICE CORPORATION INTERNATIONAL,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:06-cv-00833

Before JONES, Chief Judge, ELROD, Circuit Judge, and GUIROLA, * District Judge.

PER CURIAM: **

Plaintiff-Appellant Phillip W. Green appeals the district court's orders compelling arbitration and confirming the arbitrators' award. Finding no error, we affirm.

I. BACKGROUND

In March 2001, Green was hired by SCI Management L.P. (SCI Management), a subsidiary of Defendant-Appellee, Service Corporation

* District Judge of the Southern District of Mississippi, sitting by designation.

**Pursuant to Fifth Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Fifth Circuit Rule 47.5.4.

International (SCI). SCI and its subsidiaries provide funeral, crematory, and cemetery services. Green signed a Principles of Employment & Arbitration Procedures Agreement (the Agreement) soon after he began working for SCI Management. The Agreement provides in part:

> 1. Matters Subject to Arbitration. Employee and the Company agree that . . . all disputes related to any aspect of Employee's employment with the Company shall be resolved by binding arbitration. This includes, but is not limited to, any claims against the Company, its affiliates or their respective officers, directors, employees, or agents for breach of contract, wrongful discharge, discrimination, harassment, defamation, misrepresentation, and emotional distress, as well as any disputes pertaining to the meaning or effect of this Agreement....

As used in the Agreement, "the Company" refers to Green's employer but is not specifically identified. The first page of the Agreement includes SCI's logo, but the Agreement later provides that Green is employed by "the Company" and not by SCI or any other affiliate of the Company. Nevertheless, both parties agree that "the Company" refers to Green's initial employer, SCI Management.

On January 1, 2003, Green and all other SCI Management employees were transferred to a newly-created SCI subsidiary, SCI Funeral & Cemetery Purchasing Cooperative Inc. (SCI Funeral). Green did not sign another arbitration

agreement after the transfer. He was terminated by SCI Funeral on June 17, 2005.

After learning of Green's contention that he was terminated for reporting alleged corporate misconduct, including violations of securities laws, SCI notified Green's attorney that it intended to seek arbitration of Green's claims. Thereafter, Green filed a whistleblower complaint pursuant to the Sarbanes-Oxley Act with the Occupational Safety and Health Administration. After OSHA dismissed his complaint, he filed an appeal with the Department of Labor, but halted the administrative proceedings before a hearing was held.

On March 13, 2006, Green filed a Complaint against SCI in district court. He did not bring any claim against SCI Management or his employer, SCI Funeral. SCI simultaneously answered and filed a motion to compel arbitration.

The district court held that SCI was "the Company" referred to in the Agreement and that Green's claims against SCI fell within the scope of the arbitration clause. The district court also found that SCI did not waive its right to arbitration by participating in the administrative proceedings initiated by Green, because the administrative proceedings were not judicial in nature and any prejudice suffered by Green was self-inflicted. As a result, the court compelled Green to arbitrate his claims against SCI.

The parties participated in an arbitration, and the arbitrators determined that SCI did not violate the Sarbanes-Oxley Act. Green filed a motion to vacate the award, asserting that he did not agree to

arbitration. SCI filed a motion to confirm the award. The district court denied the former and granted the latter. Green appealed.

II. DISCUSSION

We must decide first if the Agreement binds Green and benefits SCI and if this dispute falls within its scope. Then we must decide if SCI waived its right to arbitrate by defending itself in administrative proceedings before the Department of Labor. We review a district court's decision to grant or deny a motion to compel arbitration *de novo*. *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672, 674 (5th Cir. 2006). We review *de novo* the question of whether a party's conduct amounts to a waiver of arbitration, but we review for clear error any factual findings underlying the district court's waiver determination. *Republic Ins. Co. v. PAIC Receivables, LLC*, 383 F.3d 341, 344 (5th Cir. 2004).

"Arbitration is a matter of contract between the parties, and a court cannot compel a party to arbitrate unless the court determines the parties agreed to arbitrate the dispute in question." *Pennzoil Exploration & Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1064 (5th Cir. 1998). When deciding if a party may be compelled to arbitrate, we first determine if the party agreed to arbitrate the dispute; if so, we consider whether any federal statute or policy renders the claim nonarbitrable. *Scherer v. Green Tree Servicing LLC*, 548 F.3d 379, 381 (5th Cir. 2008). The first step—the only one at issue here—consists of two considerations: whether there is a valid agreement to arbitrate between the parties and whether the dispute in question falls

within the scope of the arbitration agreement. *Id.*

Green agreed to arbitrate certain claims against "the Company" and its affiliates. Initially, the district court inferred that SCI was "the Company" in the Agreement because SCI's logo is featured on the Agreement's first page. Later, the district court clarified that "the Company" referred to Green's employer, and that SCI was an affiliate of that company. Because the Agreement required arbitration of claims against affiliates, the district court concluded that "no matter who employed Green, he is bound to arbitrate a dispute with SCI."

We agree. The Agreement provides that Green agreed to arbitrate certain specified claims against SCI Management, its affiliates, and their respective officers, directors, employees, and agents. It is undisputed that SCI is an affiliate of SCI Management. Therefore, SCI can require Green to arbitrate any claims that fall within the scope of the arbitration clause, despite the fact that SCI is not a signatory to the Agreement.[1]

We must next determine whether this dispute

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1 We apply federal substantive law when determining whether a nonsignatory to an arbitration agreement can compel a signatory to arbitrate. *See Wash. Mut. Fin. Group, LLC* v. *Bailey*, 364 F.3d 260, 267 n.6 (5th Cir. 2004); *see also Grigson v. Creative Artists Agency,* LLC, 210 F.3d 524, 527–28 (5th Cir. 2000). "Who is actually bound by an arbitration agreement is a function of the intent of the parties, as expressed in the terms of the agreement." *Sherer,* 548 F.3d at 381 (quotation marks omitted). If the agreement specifies the circumstances in which a signatory is required to arbitrate his claims against a nonsignatory, the terms of the contract gover[illegible]. *Id.*

falls within the scope of the Agreement. "[W]henever the scope of an arbitration clause is fairly debatable or reasonably in doubt, the court should decide the question of construction in favor of arbitration." *Hornbeck Offshore (1984) Corp. v. Coastal Carriers Corp.* (*In re Hornbeck Offshore (1984) Corp.*), 981 F.2d 752, 755 (5th Cir. 1993) (quoting *Mar-Len of La., Inc. v. Parsons-Gilbane*, 773 F.2d 633, 635 (5th Cir. 1985)). "[A]rbitration should not be denied 'unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation that could cover the dispute at issue.'" *Mar-Len*, 773 F.2d at 636 (quoting *Wick v. Atl. Marine, Inc.*, 605 F.2d 166, 168 (5th Cir. 1979)).

Green agreed to arbitrate any claims for wrongful discharge against SCI, an affiliate of "the Company," SCI Management. Even if the scope of the arbitration clause is susceptible to more than one interpretation, the clause must be interpreted in favor of arbitration. As a result, the district court did not err when it compelled Green to arbitrate his claims against SCI.[2]

We turn to Green's waiver argument. "There is a strong presumption against finding a waiver of arbitration, and the party claiming that the right to arbitrate has been waived bears a heavy burden." *Republic Ins. Co.*, 383 F.3d at 344. In order to

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2 Green's arguments concerning the district court's denial of his motion to vacate the arbitration award are premised on his argument that he did not agree to arbitration. Thus, we do not separately address these arguments.

waive arbitration, a party must substantially invoke the judicial process by engaging in some overt act that evinces a desire to resolve the dispute through litigation rather than arbitration. *Id.* This overt act must cause prejudice to the party alleging waiver. *Id.* at 346.

We have not yet addressed the issue of whether a party's participation in an administrative proceeding constitutes a waiver of the right to arbitration. We do not reach this issue here, however, because even if the Department of Labor proceedings could be considered judicial in nature, SCI's participation in those proceedings did not waive its right to arbitrate. *See, e.g., Walker v. J.C. Bradford & Co.*, 938 F.2d 575, 577–78 (5th Cir. 1991) (finding no waiver when a defendant conducted discovery and waited thirteen months before demanding arbitration, particularly because the discovery was minimal and the defendant did not ask the court to make any judicial decision by filing dispositive motions); *Tenneco Resins, Inc. v. Davy Int'l, AG*, 770 F.2d 416, 420–21 (5th Cir. 1985) (finding no waiver when a defendant participated in eight months of discovery before filing a motion to compel arbitration). *But see Republic Ins. Co.*, 383 F.3d at 344–47 (finding waiver when Republic filed the lawsuit in federal court and waited until a few days before trial was scheduled to begin before asserting its right to arbitration, noting that the defendant was prejudiced by having participated in full-fledged discovery and trial preparation).

SCI immediately demanded arbitration prior to the administrative proceedings and only defended

itself in those proceedings, which were initiated by Green. Furthermore, there is no indication that SCI engaged in any conduct that evinced a desire to resolve this dispute by litigation rather than arbitration. The parties merely engaged in limited discovery, obtained an agreed protective order, and made pre-hearing submissions during the administrative proceedings. Immediately upon answering in district court, SCI sought to compel arbitration, filing its motion to compel less than one year after Green was terminated by SCI Funeral. Finally, Green has not demonstrated that he was prejudiced by the delay. He merely alleges in a general fashion that the passing of time, the discovery conducted, and the expense incurred during the administrative proceedings caused him prejudice. Thus, SCI did not waive its right to arbitration by participating in the administrative proceedings.[3]

III. CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

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3 In his reply brief, Green raises various other arguments for the first time. Arguments raised for the first time in a reply brief are waived. *United States v. Jackson*, 426 F.3d 301, 304 n.2 (5th Cir. 2005).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PHILIP W GREEN,	}	
	}	
Plaintiff,	}	
	}	
VS.	}	CIVIL ACTION NO.
	}	H-06-833
SERVICE	}	
CORPORATION	}	
INTERNATIONAL,	}	
	}	
Defendant.	}	

FINAL JUDGEMENT

Pursuant to the Opinion & Order Confirming Arbitration Award, it is hereby

ORDERED, ADJUDGED, AND DECREED that the Award of the Arbitrators, attached hereto as "Exhibit A" and dated October 29, 2007, in the Arbitration between Philip W. Green and Service Corporation International, be and the same is hereby CONFIRMED and shall have the full force and effect as an Order of this court. It is further

ORDERED, ADJUDGED, AND DECREED that the Award of the Arbitrators attached hereto as "Exhibit A" and dated October 29, 2007, in the Arbitration between Philip W. Green and Service Corporation International, and all of the findings of fact, conclusions of law, and awards contained

therein are hereby adopted by the Court as this Court's own Order. Accordingly, and pursuant to the Award of the Arbitrators attached hereto as "Exhibit A, it is hereby

ORDERED, ADJUDGED, AND DECREED that all claims asserted by Plaintiff Phillip W. Green against Defendant Service Corporation International are hereby DISMISSED WITH PREJUDICE. Defendant's request for specific performance is moot because Defendant has obtained the remedy of arbitration that was sought.

THIS IS A FINAL JUDGMENT.

Signed at Houston, Texas this 25th day of August 2008.

s/

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

IN THE MATTER IN ARBITRATION
Before Arbitrators Richard R. Carlson, Chair,
Patrick M. Flynn & A. Martin Wickliff, Jr.

PHILIP W. GREEN

And

SERVICE CORPORATION INTERNATIONAL

Arbitrators' Award

The purpose of this arbitration proceeding is to decide certain disputes between Service Corporation International (SCI) and Philip Green relating to Mr. Green's claims that SCI unlawfully discharged him from employment in violation of the anti-retaliation provision of the Sarbanes Oxley Act (SOX), 18 U.S.C. § 1514A, and that SCI committed certain common law torts in connection with his discharge. These disputes are before the arbitrators as a result of a U.S. District Court order directing the parties to submit their dispute to arbitration in accordance with their agreement embodied in SCI's Principles of Employment & Arbitration Procedures (PEAP). (X-82).

I. Facts

A. The Parties

SCI is a provider of funeral and cemetery services, and it operates 2600 funeral homes and cemeteries throughout the nation. SCI has or has had a number of subsidiaries. Three of these subsidiaries, SCI Executive Services, Inc., SCI Management L.P. (SCI Management) and SCI Funeral & Cemetery, are relevant to these

proceedings. We refer to the entire corporate family collectively as the "Company" in this award.

SCI has created a number of channels for employees to use if they wish to report wrongdoing or illegal activity at the company. The Employee Handbook includes a section on "Illegal or Fraudulent Acts," which states that "all employees are responsible for promptly reporting any fraud, misappropriation of Company assets, and/or any other irregularity occurring in the workplace...." (X-96, p. 10). That section of the Handbook is followed by an Employee Problem Solving Policy and Procedure, which describes how employees can take perceived problems up the chain of command.

If an employee chooses not to confront his own supervisor or higher management directly about a problem, the employee can call anonymously to a company "Careline," which is a toll-free number operated by an independent firm. The company periodically reminded employees about the Careline in its employee newsletter, in messages included with pay stubs, or in workplace posters.

Finally, some employees are required to file quarterly certifications that eventually reach the company's Disclosure Committee. The certifications are used by the company in preparing public reports, and an employee who believes or knows of some irregularity can include an "exception" in the certification describing the irregularity.

The plaintiff Philip Green is a licensed attorney and a certified public accountant. And after several years of experience working in the banking

industry, he started his employment with SCI in February 2001. (X-1, X-81). As was typical for many employees of the corporate offices, Mr. Green's nominal employer was SCI Management. In contrast, the nominal employer for corporate executives was SCI Executive Services, Inc. After January 2003, Mr. Green's nominal employer was another subsidiary, SCI Funeral & Cemetery Purchasing Cooperative. Mr. Green served as Director of Corporate Finance for SCI until the time of his discharge in May 2005. During the period relevant to this proceeding, Mr. Green's immediate supervisor was Jeff Curtiss, Senior Vice President and Chief Financial Officer of SCI. Mr. Green's subordinate and assistant was Eric Bartee.[4]

At the hearing, Mr. Curtiss recalled that until the months preceding Mr. Green's discharge, Mr. Green was a good employee; smart but eccentric; outspoken, "tenacious," and a frequent critic of SCI's business strategy. In Mr. Curtiss' view, Mr. Green "showed less tolerance for risk" than other managers at SCI. Mr. Bartee recalled that Mr. Green was a "dedicated" employee until the months preceding his discharge, when Mr. Green seemed angry at upper management and began to "slack," leaving more work for Mr. Bartee.[5]

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[4] Mr. Curtiss is an attorney with an LLM in Tax, a CPA, and CFA.

[5] Mr. Bartee testified that he noticed a change in Mr. Green's work ethic after October 2004, when Mr. Curtiss told Mr. (contd.)

By all accounts, the event that soured the relationship between SCI and Mr. Green involved SCI's effort to obtain a letter of credit with certain terms in its dealings with a Chinese business partner. From Mr. Green's point of view, SCI's conduct in seeking the letter of credit was a cause of one his complaints against SCI and the basis for his allegedly protected activity. From SCI's point of view, Mr. Green's allegedly substandard performance in connection with the letter of credit was the real and lawful cause for his discharge. Mr. Green and SCI interpret the facts surrounding the letter of credit very differently, but they appear to agree that this event was the beginning of the end of their relationship. It is with this event that we begin our discussion, although Mr. Green has also alleged some earlier instances of protected conduct.

B. The Letter of Credit

During the latter part of 2004 and in January 2005, SCI was attempting to secure a new supply of caskets for its funeral business. It had identified a potential supplier in China. However, the Chinese firm had not yet finished facilities necessary for the manufacture of caskets, and it needed financing to complete the facilities. Moreover, SCI believed that the Chinese firm would not likely succeed unless it had more business than SCI alone could provide. Therefore, the negotiations arrived at solutions for each of these problems. First, in order to increase

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Green that Mr. Green was overpaid and Mr. Green was not going to get a raise or a promotion.

the Chinese firm's market, SCI offered to become the exclusive distributor for that firm's caskets throughout the Americas. Second, in order to assist the Chinese firm in securing financing to complete its facilities, the negotiators decided that SCI would provide a $4 million letter of credit to prove its ability to buy large numbers of caskets. The parties anticipated signing an agreement on January 26, 2005.

In retrospect, it is not clear whether the negotiators for SCI and the Chinese firm understood the limitations of a letter of credit or whether a letter of credit was the ideal solution to the Chinese firm's problem. As subsequently explained by Mr. Green, it was his understanding that the letter of credit was to be for a term of six months, but the caskets were not in fact expected to be ready for delivery in six months. The function of the letter of credit was merely to assure the Chinese firm's potential investors and lenders of the viability of their business relationship with SCI. Both parties agree that there was some risk in using a letter of credit in this fashion. The Chinese firm might really intend to use the letter of credit fraudulently, to draw on the letter with false documents and without producing or delivering any caskets at all.

The task of obtaining the letter of credit fell to Mr. Green who was the person at SCI who routinely handled letters of credit. The assignment came to Mr. Green via Harry Loring, Assistant Treasurer, on about January 24, 2005. Mr. Green understood that the letter of credit was needed "right away" because SCI's negotiators were

expecting to meet very soon with their Chinese counterparts and they wanted to have the letter in credit in hand. Mr. Green also understood that SCI's General Counsel, James Shelger, wanted the letter of credit to contain provisions to protect SCI from fraud, including a requirement of certification of shipping of caskets and a verified signature of an SCI official. Mr. Green doubted that such provisions could be included in a letter of credit, but he warned no one of his reservations. He completed a standard application for a "stand by" letter of credit (X-50) and sent it to SCI's bank, J.P. Morgan, indicating that the application was a "rush" item. (X-51).

Mr. Green's decision to seek a "standby" letter of credit instead of a commercial letter of credit is a matter of importance in this case. Depending on how SCI's purposes might first have been explained to Mr. Green, it may have seemed that a standby letter of credit was the appropriate vehicle. As it turned out, however, Mr. Green could have and perhaps should have applied for commercial letter of credit in view of the types of protective provisions Mr. Shelger desired.

Although Mr. Green faxed the letter of credit application on January 24, 2005, he did not hear any response from the bank on that day. The lack of response was not unusual or unexpected because the application was received by the bank's Houston office and was subject to approval by another office in Tampa—a process that would ordinarily require at least an additional day. On the following day, January 25, 2005, SCI's Chairman of the Board, Robert Waltrip, called Mr. Shelger to get an update

on the letter of credit. Obtaining a letter of credit would not ordinarily be a function of the legal department, and Mr. Shelger had little experience and no training with respect to letters of credit, but he assured Mr. Waltrip that Mr. Green was working on the letter of credit.

Not long after Mr. Waltrip's call to Mr. Shelger, Mr. Shelger called Mr. Green to confirm progress on the letter of credit. Until this time, Mr. Shelger and Mr. Green had had no occasion to work together, and they were barely acquainted. Mr. Shelger told Mr. Green he was being "hammered" by upper management about the letter of credit. Mr. Shelger also emphasized the importance of obtaining a letter of credit with terms that would protect SCI against fraud by the Chinese firm. In particular, Mr. Shelger wanted the letter of credit to be conditioned on twenty-four hours advance notice to SCI, so that SCI could confirm that other conditions were satisfied and could seek injunctive relief in case of any fraud. Mr. Shelger also wanted the letter of credit to be conditioned on a signed, verified statement by an SCI official approving any draw by the Chinese firm.

Mr. Green doubted that such terms could be included in a letter of credit, but he agreed to confirm this with the bank. Unfortunately, Mr. Green admittedly did not clearly state his reservations with Mr. Shelger at this time. Thus, at the conclusion of this conversation, Mr. Shelger would have had little reason to believe there was any impending problem.

Mr. Green then spoke with an employee of the bank, Debra Teague, about the terms proposed by Mr. Shelger. In Ms. Teague's view, these terms were not possible. Since the terms were very important to Mr. Shelger, Mr. Green arranged a conference call between himself, Mr. Shelger and Ms. Teague. Again, Ms. Teague insisted that the protective provisions desired by Mr. Shelger were not possible. As noted above, Mr. Shelger had little experience or training in letters of credit, and he was depending on Mr. Green to take SCI's position or propose a solution; however, Mr. Green offered no help. At the hearing, Mr. Green maintained that if Mr. Shelger were concerned about fraud by the Chinese firm, even the terms proposed by Mr. Shelger would not have helped, and that there was no practical way to minimize such a risk in the terms of a letter of credit.

At some point, it was Ms. Teague who suggested that what SCI required was not a standby letter of credit, but a "documentary" or "commercial" letter of credit. Until Ms. Teague's suggestion, it had not occurred to Mr. Green that a documentary/commercial letter of credit might be a more appropriate approach. Mr. Green testified at the hearing that he had not considered a commercial letter of credit because he understood that the letter of credit was not for goods that would be "shipped," and that a commercial letter of credit would have made little difference in protecting SCI from fraud. In any event, some of Mr. Shelger's proposed conditions still presented a problem for Ms. Teague even if the letter of credit were a commercial letter of credit.

Mr. Shelger became increasingly agitated. He threatened to cease doing business with the bank, and he asked to speak with Ms. Teague's supervisor. Ms. Teague put Mr. Shelger on hold. She returned a few minutes later stating that her supervisor confirmed that a requirement of verification of signature was not possible. Indeed, Mr. Shelger eventually spoke directly with a supervisor, and the supervisor reiterated Ms. Teague's position. However, these bank employees did eventually agree to one request by Mr. Shelger: in order to address any doubts the Chinese firm might now be harboring, the bank would issue a letter stating that SCI had made an application and that a letter of credit was forthcoming. Mr. Shelger hoped that such a letter would satisfy the Chinese negotiating team if a letter of credit were not available in time for the next meeting with the Chinese.

After this conversation with Ms. Teague and her supervisor, Mr. Shelger sought the aid of Mr. Green's supervisor, Mr. Curtiss. Mr. Shelger told Mr. Curtiss of his frustration and of the apparent lack of effort by Mr. Green and the bank to resolve the form of the letter of credit. Like Mr. Shelger, Mr. Curtiss had limited knowledge or experience with letters of credit, except for routinely signing on behalf of SCI for letters of credit obtained by Mr. Green. In retrospect, Mr. Curtiss testified, some of the protections Mr. Shelger sought were not viable in exactly the form proposed by Mr. Shelger. At the time of these events, however, Mr. Curtiss shared Mr. Shelger's frustration with Mr. Green's

seeming unwillingness to propose solutions or alternatives.

Mr. Curtiss decided to confer with SCI's "relationship banker" at the bank, Mike Costello. In retrospect, it is not clear why it had not occurred to Mr. Green to call Mr. Costello as soon as difficulties arose, because Mr. Costello had frequently worked with Mr. Green in the past. Mr. Curtiss related the situation to Mr. Costello, who immediately advised that a commercial—not standby—letter of credit was the likely solution to the problem.

In the meantime, Ms. Teague forwarded to Mr. Green a draft of a letter by the bank confirming SCI's application for a letter of credit. (X-54). Unfortunately, after confirming the application the letter stated, "By execution of this Letter [the bank] makes no representation or commitment to issue this Letter of Credit." The letter hardly constituted the assurance Mr. Shelger believed SCI needed to present to the Chinese firm. Nevertheless, when Mr. Green received the draft late in the morning on Wednesday, January 26, he simply forwarded it to Mr. Shelger with the note, "I hope this is acceptable." (X-54). Mr. Green neither sought stronger words of assurance from the bank nor warned Mr. Curtiss or Mr. Shelger that the letter he had received was much less than desired. When Mr. Shelger discovered that the letter was less than what he had expected, he became even more frustrated with Mr. Green. In Mr. Shelger's view, Mr. Green should have demanded modification of the bank's letter, rather than acting like a mere "messenger."

Again, SCI conferred with Mr. Costello at the bank. By early in the afternoon on the same day as the first draft, Mr. Curtiss, Mr. Costello and counsel for the bank and SCI had developed a revised version of the letter (X-55). The new version confirmed the application and then added:

> Although the bank has not yet issued the letter of credit requested by the application, we have discussed the terms of the request and find them generally acceptable. Further, we noted that SCI's bank credit facility ... currently has available capacity under which the letter of credit could be issued, and the Bank has no reason to believe that the application will not be accepted and processed in due course. (X-56).

This letter by the bank evidently satisfied the Chinese firm, and the parties did, in fact, execute a distributorship agreement soon after the issuance of this letter. (X-59).

Also, on Wednesday, a secretary informed Mr. Green that Robert Waltrip, Chairmen of the Board of Directors, was waiting to speak with him on the telephone. Mr. Green had never worked directly with Mr. Waltrip before this time. However, he knew Mr. Waltrip was the Chairman of the Board. Mr. Green answered on a speaker phone in the presence of Mr. Shelger. After Mr. Waltrip identified himself, Mr. Green stated, "yeah?" Mr. Waltrip replied, "You'll address me as 'sir.'" (Mr. Shelger recalled Mr. Waltrip stating, "Do you think you could say 'yes sir?'" Mr. Green testified that he

initially thought Mr. Waltrip was "joking," but he soon realized that Mr. Waltrip was serious.

As recalled by Mr. Shelger, Mr. Waltrip then said, "we've got to have the letter of credit," to which Mr. Green replied, "It would have been nice if you gave me more time." (At the hearing, Mr. Green denied this part of Mr. Shelger's recollection). Mr. Waltrip then stated that he understood Mr. Green had been working on the letter of credit for two days, which was "enough;" that he wanted to hear no explanation or excuse, and that Mr. Green should simply "get it done." Mr. Green answered, "I'll do my best," to which Mr. Waltrip replied, "That's not good enough."[6]

However, Mr. Shelger now relied mainly on outside counsel for SCI, Andrew Gregory, and Mr. Costello to develop the suitable form for the letter of credit. At the hearing, Mr. Shelger explained that he referred the matter to Mr. Gregory, because he believed that Mr. Green no longer seemed to care about the matter. One part of the solution for SCI and the bank was a side agreement between the bank and SCI. (X-60). The side agreement required the bank to give advance notice to SCI before funding any draw made on the letter of credit. The other part of the solution was in the application and letter of credit. (X-61 and X-62).

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[6] Mr. Waltrip claimed that he spoke with Mr. Green to find out the status of the letter of credit and to stress the importance of it, but Mr. Green did not seem concerned because he was working on other matters. Mr. Waltrip characterized Mr. Green's demeanor as "very rude, very inappropriate." (X-127, p. 16).

Among other things, the letter of credit required that the bank would not fund a draw without an inspection certificate with the notarized signature of a designated SCI official. At the hearing, Mr. Costello testified that it was not unusual for parties to negotiate the terms of a letter of credit in this fashion. Nor did he believe there was anything illegal or improper in what SCI had sought, what SCI finally obtained, or the manner in which SCI obtained these terms.[7]

At the hearing, Mr. Shelger stated that he believed Mr. Green's work with respect to the letter of credit was not sufficiently creative, resourceful, inventive or communicative. Mr. Curtiss testified that Mr. Green had failed to act as an advocate for SCI. In contrast, Mr. Green's position at the hearing was that the provisions of the final letter of credit and side agreement still left SCI at risk of fraud. He also maintained that SCI's conduct with respect to the letter of credit involved some "illegality" and possibly "wire fraud," although the bases for these claims remain vague. Mr. Green conceded that SCI did not make any misrepresentation to the Bank. Moreover, he admitted that there was nothing wrong in principle with Mr. Shelger's desiring to protect SCI from risk or requesting protective conditions. Mr. Green asserted that "when you threaten people's jobs, that

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[7] Mr. Costello, who has a BBA and MBA from the University of Texas, has been with Chase Bank for 19 years. He is a client manager for about 12 companies, SCI being one of them.

approaches a violation of federal law."[8] However, Mr. Green conceded that it would not have been illegal for SCI to cease doing business with the bank (in accordance with Mr. Shelger's threat to Ms. Teague). In any event, Mr. Costello testified that he did not feel intimidated by Mr. Shelger, and he did not believe there was anything illegal or improper in SCI's conduct.

C. The Reprimand and the Termination

Having negotiated the terms of the letter of credit, Mr. Shelger then met with Mr. Curtiss and expressed his opinion that Mr. Green had shown a lack of leadership and initiative and should be reprimanded.[9] On January 26, 2005, the day the bank issued the letter of credit, Mr. Waltrip and Mr. Shelger told Mr. Curtiss they were disappointed in Mr. Green's handling of the letter of credit. On February 2, 2005, Mr. Curtiss gave Mr. Green a letter of reprimand. (X-64).[10] Mr. Green and Mr. Curtiss disagree about what

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[8] This statement by Mr. Green might have been in reference to Mr. Shelger's tone and demeanor toward Ms. Teague, or perhaps in reference to Mr. Shelger's efforts to have Mr. Green disciplined.

[9] Mr. Shelger testified that he had no further involvement in disciplinary action against Mr. Green or in the decision to terminate Mr. Green. However, he stated he was Anot surprised@ that SCI did terminate Mr. Green.

[10] Mr. Green wrote on the reprimand that he would respond "later with my impression of the facts." (X-64). His response came three months later in his letter to the Company's outside directors, which is discussed, below.

happened at this meeting. According to Mr. Curtiss, he told Mr. Green clearly that Mr. Green had no future with SCI and should begin looking for other employment. Mr. Curtiss had decided that a person in Mr. Green's position needed upper management's confidence—confidence that was now lacking. Mr. Curtiss did not tell Mr. Green that he would be terminated on a particular date, because Mr. Curtiss did not know how long it might take Mr. Green to find another job, and Mr. Curtiss believed it would be easier for Mr. Green to find a new job if he were not first terminated. For the same reason, Mr. Curtiss did not state in the written reprimand that Mr. Green would be fired if he did not soon find another job by some deadline.

According to Mr. Green, Mr. Curtiss agreed that Mr. Waltrip had overreacted and he urged Mr. Green to "let it blow over." Mr. Green denied that he and Mr. Curtiss discussed the need for Mr. Green to find other employment, but he admits that by some point very soon thereafter, probably in February of 2005, Mr. Curtiss did warn him that there was "no future" for Mr. Green with SCI and no possibility of promotion or advancement. Indeed, in about February or March of 2005, in conversation with Mr. Bartee, Mr. Green commented that he had no future with SCI and needed to find other employment. Mr. Bartee offered to help. (X-85). Mr. Bartee also recalled that during this period Mr. Green seemed to "slack," leaving more work for Mr. Bartee.

Whether or not Mr. Curtiss was sufficiently clear in warning Mr. Green of the necessity of finding other employment, Mr. Green admitted that he

understood he was working in a "poisoned" atmosphere, and he did, in fact, begin looking for another job. In February 2005, not long after the reprimand, Mr. Green asked Marilyn Brown to type his resume; Mr. Curtiss urged her to do so. Mr. Curtiss also reviewed Mr. Green's resume to offer suggestions, and he gave Mr. Green materials for a job search. By no later than March 2005, Mr. Green had begun to send his resume to other parties in search of a job.

According to Mr. Curtiss and Mr. Bartee, Mr. Green's performance during this time continued to deteriorate. Moreover, while Mr. Curtiss and Mr. Green had never been particularly formal with each other, Mr. Green became more and more disrespectful and vulgar. He was overheard to call Mr. Curtiss a "moron" and other derogatory names. Mr. Green may have intended such name-calling in jest, as he maintained at the hearing. However, his subordinate Mr. Bartee testified that such language was not common around the office, and hearing such words made Mr. Bartee so uncomfortable he withdrew, even from his own office at times, to avoid hearing Mr. Green's confrontations with Mr. Curtiss.

While Mr. Green had no further occasion to work for Mr. Shelger, Mr. Green was openly disrespectful and derisive of Mr. Shelger in front of other employees. He was overheard to call Mr. Shelger an "SOB" or a "dictator." On one occasion he sang a song out loud to the tune of "Davy Crockett," but Mr. Green had changed to words to make insulting reference to Mr. Shelger.

On May 6, 2005, Mr. Green was angered to learn that he would not be receiving a raise. Mr. Curtiss had decided not to give Mr. Green a raise because he was expecting Mr. Green to leave SCI. Mr. Green confronted Mr. Curtiss about the lack of a raise, and Mr. Curtiss replied, "yes, you're not getting a raise, you're overpaid." Mr. Green recalled telling Mr. Curtiss that he was angry, not just because of the lack of a raise, but also because of "stealing from SCI with the PUPS."[11] Then Mr. Green blurted out, "F___ you; F___ SCI." Marilyn Brown, then Executive Assistant supporting Mr. Curtiss and Mr. Green, testified that Mr. Green then left the office and did not return for the remainder of the day.

The following workday, May 9, 2005, Mr. Green was scheduled to have one of his periodic meetings with the trustees who managed the prepaid funds of SCI's customers. Mr. Green ordinarily conducted these meetings with Mr. Bartee, but when the meeting began that morning, Mr. Green was not present. Mr. Bartee informed Mr. Curtiss that Mr. Green was not at the meeting—Mr. Green had remained in his office. Mr. Curtiss took over the meeting with Mr. Bartee. Mr. Curtiss later commented to Mr. Bartee, that he didn't know how much longer he could give Mr. Green to hunt for another job.

Not long after the trustee meeting, Mr. Curtiss consulted with SCI's president, Tom Ryan. There

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[11] The "PUPS" are described further below.

were several impending meetings with the rating agencies, and Mr. Green ordinarily would be expected to participate in those meetings. However, neither Mr. Curtiss nor Mr. Ryan wanted Mr. Green to be present at those meetings. This discussion solidified Mr. Curtiss' decision to terminate Mr. Green very soon. However, Mr. Curtiss was scheduled for a business meeting in Chicago, and he decided to wait until returning to deal with Mr. Green.

On May 20, 2005, while Mr. Curtiss was away, Mr. Green sent a letter that constitutes his principle alleged protected activity. The letter, which was addressed to the independent members of SCI's Board of Directors, began,

> I am writing to advise you of the conduct of a senior SCI officer, Jim Shelger, that in my opinion is not in keeping with the ethical standards that such an officer should meet. Furthermore, such behavior represents a continuous threat to present and future SCI employees in the professional and ethical execution of their responsibilities to SCI, themselves, their families and to the laws of the United States. (X-65).

Mr. Green's letter then summarized the events relating to the episode involving the letter of credit. He also argued that the conditions Mr. Shelger sought were "non-documentary" and would have violated federal regulations. See 12 C.F.R. § 7.1016(a) (a "bank's obligation to honor [a letter of credit] depends upon the presentation of specified documents and not upon non-documentary

conditions or resolution of questions of fact or law at issue between the applicant and the beneficiary").[12] The remainder of the letter criticized the judgment and character of Mr. Shelger and Mr. Curtiss in a number of respects, but did not otherwise allege any violation of the law. Mr. Green delivered a similar letter to Tom Ryan, the CEO of SCI.

About the time Mr. Green delivered these letters, he commented to Mr. Bartee that he did not expect to be around much longer. Indeed, Mr. Curtiss had already decided to terminate Mr. Green, according to Mr. Curtiss' testimony. Mr. Curtiss had planned to terminate Mr. Green as soon as Mr. Curtiss returned to Houston. However, when Mr. Curtiss arrived in Houston, Mr. Ryan instructed him not to terminate Mr. Green until SCI could complete an independent investigation of the matter.

SCI engaged the law firm of Hinton, Sussman, Bailey & Davidson, L.L.P. to conduct this independent investigation of Mr. Green's allegations. After interviewing employees of SCI, the bank and the other attorneys involved in the matter, Robert Sussman of Hinton, Sussman issued

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[12] Mr. Green stated that Mr. Shelger attempted to influence the bank and pressure him to influence the bank "to issue a standby letter of credit" in violation of U.S. laws. In fact, the evidence established that Mr. Shelger was not really aware of the differences between a standby letter of credit and a commercial letter of credit (non-documentary and documentary, respectively).

a letter on June 15, 2005 with the following conclusion:

> Based on our observations, at this point, we do not believe there was an effort on the part of Mr. Shelger to coerce or pressure JP Morgan Chase to violate federal banking regulations or to otherwise engage in improper conduct. As a result, we do not believe Mr. Shelger attempted to have Mr. Green engage in any such misconduct. To a great degree, the complaints of Mr. Green related to a misunderstanding on the part of several SCI employees, including Messrs. Green and Shelger, as to the purposes and properties of a standby letter of credit versus a commercial letter of credit. (X-69).[13]

Two days later, on June 17, 2005, Mr. Curtiss presented a letter of termination to Mr. Green. (X-70). Mr. Green said little at this meeting with Mr. Curtiss, and he seemed to expect the termination. Mr. Green had already packed up his possessions and was ready to leave.

II. Procedural Background

On August 26, 2005, Mr. Green's attorney filed a complaint on Mr. Green's behalf with the Department of Labor. (X-94). The complaint alleged that Mr. Green's discharge "was the culmination of actions taken against Mr. Green motivated by a desire to retaliate against Mr.

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[13] The independent counsel also characterized the balance of Mr. Green's complaints as those that "relate primarily to management style and personality issues." (X-69).

Green for several and continuous disclosures and complaints he has made to his supervisor and other company officials and officers." The complaint alleged that the letter of credit incident was a "pretext" for the termination of Mr. Green's employment after Mr. Green's letter to the Board of Directors. The complaint also listed five other matters as to which Mr. Green had made protected reports, and it alleged that these reports, along with the letter to the Board of Directors, were the real reason for Mr. Green's discharge. We will discuss these other matters in greater detail in our discussion of the merits of Mr. Green's complaint, below.

The Department of Labor issued its initial findings on November 29, 2005. The Department's letter stated that "there is no reasonable cause to believe that Respondent violated SOX and issues the following findings." (X-95). Curiously, despite this statement by the Department, its findings did not address whether SCI had violated SOX. Instead, the Department found only that Mr. Green's complaint was "untimely," a finding as to which the Arbitrators disagree. The issue of timeliness is addressed in greater detail below.

Choosing the judicial rather than the administrative remedy under SOX, Mr. Green filed a lawsuit in the U.S. District Court, *Green v. Service Corporation International*, Civil Action No. 4:06-CV-0083. *See* 18 U.S.C. § 1514A(b)(1). SCI subsequently filed a motion to compel arbitration, and the District Court granted that motion on June 30, 2006. (X-143).

In accordance with the District Court's order and the PEAP, the parties selected three arbitrators to serve as neutrals. Mr. Green selected Mr. Patrick M. Flynn as an arbitrator; SCI selected A. Martin Wickliff, Jr. as an arbitrator; and Messrs. Flynn and Wickliff selected Richard R. Carlson as the third arbitrator and chair of the arbitration panel. The arbitrators and parties conducted a five day hearing from July 16 to July 20, 2007 at the Frank Evans Center for Conflict Resolution at South Texas College of Law in Houston, Texas.

Throughout the arbitration proceeding, Mr. Green has denied the jurisdiction and authority of this tribunal. His appearance at the hearing and presentation of evidence supporting his claim against the SCI was without prejudice to his jurisdictional challenge. SCI insists that the dispute is subject to arbitration, denies that that Mr. Green's administrative complaint was timely, denies the merits of Mr. Green's SOX claim, and asserts a counterclaim for attorney's fees based on Mr. Green's resistance to arbitration. We address the issue of jurisdiction first, then the issue of timeliness, then the merits of Mr. Green's claim, and finally SCI's counterclaim for attorney's fees.

III. Jurisdiction

The arbitrators conclude that they do have jurisdiction over Mr. Green's SOX claim. There are two reasons for this conclusion.

First, the district court found that SCI's Principles of Employment and Arbitration Procedures (PEAP) constituted a binding contract to submit such disputes to arbitration, and it

directed the parties to submit Mr. Green's SOX claim to arbitration. Mr. Green argued before the court, as he did before the arbitrators, that the PEAP did not name SCI as a party to the agreement. However, the court's June 30, 2006 Order noted that SCI's logo was on the PEAP, and "this court must infer that the arbitration agreement referred to SCI and that Green accepted binding arbitration." (Order of June 30, 2006, p. 3). The court then "ORDERED that the motion of SCI is GRANTED" and that "[t]he parties shall resolve their dispute through binding arbitration according to the agreement." (Order of June 30, 2006, p. 4).

Mr. Green moved the court to reconsider its order, but the court denied that motion in an order dated August 17, 2006:

> The arbitration agreement itself compels Green to arbitrate any disputes not only with his employer, but also with any of the employer's affiliates. SCI, the defendant, is an affiliate of Green's employer, SCI Funeral and Cemetery Purchasing Cooperative, Inc.... Thus, no matter who employed Green, he is bound to arbitrate a dispute with SCI. (X-144).

The following day, the court granted SCI's Motion to Enforce the Court's Order Compelling Arbitration: "Plaintiff is hereby ORDERED either to begin the arbitration process pursuant to the terms of the Arbitration Agreement ... or (2) in the alternative, to face dismissal with prejudice of his claims against SCI." (X-145).

The district court's findings and orders leave no issue of arbitrability for the arbitrators to resolve.

The court did not reserve the issue whether Mr. Green's claims were subject to arbitration under the agreement. The orders directing the parties to submit their dispute to arbitration neither require nor authorize the arbitrators' decision whether Mr. Green's claims are subject to arbitration. Whether or not the arbitrators agree with the district court's resolution of issues regarding arbitrability, these issues appear to be concluded, except for the possibility of further appeal from the district court.[14]

Assuming, *arguendo*, the doubtful proposition that the arbitrators have any authority to reconsider any aspect of the district court's orders, the arbitrators agree with the district court's conclusion that the court had the responsibility to decide whether the agreement to arbitrate was enforceable and applicable to Mr. Green's claim against SCI. The district court's conclusion is consistent with the U.S. Supreme Court's most recent statements regarding the enforcement of agreements to arbitrate.

In *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S.Ct. 1204 (2006), the Court described three types of cases in which a party challenges the enforceability of an agreement to arbitrate. In the first type of case, a party

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[14] Mr. Green did appeal to the Fifth Circuit, but the Fifth Circuit denied the appeal for lack of jurisdiction under the Federal Arbitration Act, 9 U.S.C. ' 16(b), which provides that an interlocutory appeal may not be taken from an order directing arbitration. Green v. SCI, Case No. 06-20732 (5th Cir., May 30, 2007). (X-153).

"challenges specifically the validity of the agreement to arbitrate." In this type of case, a court has the authority to decide whether the agreement to arbitrate is valid and enforceable. 126 S.Ct. at 1208. In a second type of case, a party "challenges the contract as a whole, either on a ground that directly affects the entire agreement ... or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid." In this second type of case, the court should not decide the validity of the contract. Instead, it should refer the issue to the arbitrator. Finally, there is a third class of cases in which a party raises an "issue of whether *any agreement between the alleged obligor and obligee was ever concluded.*" (emphasis added). 126 S.Ct. at 1208 & note 1. The Supreme Court expressed no opinion as to whether this kind of issue is for a court or for an arbitrator to decide. However, lower federal courts have held that a court may decide such an issue. *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851 (11th Cir. 1992).

The instant case can be placed among those of the first type, because Mr. Green has challenged "specifically the validity of an agreement to arbitrate." He raises no issue as to the validity of any other part of his contractual relationship with SCI. The underlying claim is that SCI violated a statute—SOX—and not that SCI violated a contract or is precluded from enforcing some contract right other than the right to arbitrate. Thus, Mr. Green's challenge "specifically to the validity of an agreement to arbitrate" was for the district court to decide. Were Mr. Green challenging the validity of

a non-competition agreement or other contract that included arbitration as a prescribed means of enforcement, the case would be of the second type described in *Buckeye*, and the issue of the validity of the contract as a whole would be for the arbitrators, not the court.[15] However, the contract issues in this case go straight to the issue of arbitrability and fall squarely within the province of the court.

This case might also be described as being of the third type: those in which a party denies that *any* contract was ever made with the party demanding arbitration. As described further below, Mr. Green specifically challenges the arbitration agreement by arguing that SCI is not a party to the arbitration agreement. In other words, it is Mr. Green's position that there is no contract between SCI and him. The Supreme Court in *Buckeye* did not decide whether a court or an arbitrator should decide such an issue, but neither did it disagree with lower court decisions holding that such an issue is for a court rather than an arbitrator to decide.

Finally, the arbitrators agree with the district court that the PEAP constitutes a binding contract for arbitration of the underlying dispute in this case. Mr. Green's position is that the PEAP does not apply to this dispute because SCI is not a party to the PEAP, and because the PEAP does not apply to disputes between Mr. Green and SCI. The

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[15] It could also be viewed that, unlike *Buckeye*, the only contract here is the agreement to arbitrate. Thus, the court rather than the arbitrators should decide whether there is a valid arbitration agreement.

district court rejected this argument, and so do the arbitrators.

The issue of whether the PEAP applies to disputes with SCI stems from the PEAP's ambiguous manner of describing the "Company" that is a party to the agreement with Mr. Green. If there were only one company involved in Mr. Green's employment, the identity of the "Company" might be obvious; but Mr. Green was employed by at least one entity of a family of affiliated companies. Both Mr. Green and SCI appear to agree that when Mr. Green signed the agreement, his nominal employer was SCI Management L.P. Mr. Green also acknowledges that he understood that SCI Management was a subsidiary of SCI. The dispute centers on whether SCI may be regarded as a party to the agreement (employer or not), or whether SCI is at least entitled to the benefit of Mr. Green's agreement to submit his employment disputes to arbitration.

The first sentence of the PEAP states that the PEAP is adopted by "Your employer, identified below (the 'Company')." (X-82). At the bottom of the last page of the PEAP, across from Mr. Green's signature (which identified him as "EMPLOYEE"), the PEAP includes the word "COMPANY:" followed by a space where SCI might have been identified, but this line is blank. Carol Prescott signed the PEAP as "Manager/ Human Resources," but there is no other indication in this part of the PEAP as to the identity of the "Company."

The PEAP appears to exclude SCI from being either the "Company" or the "employer." In *an*

Affirmation of At Will Employment Status, the PEAP states, "Employee further acknowledges that he/she is employed by the company identified below and *not* by such company's ultimate parent company, *Service Corporation International*, or any other affiliate of SCI." (X-82) (emphasis added). Nevertheless, there are several facts from within and outside the four corners of the PEAP that clarify that SCI is either a party to or beneficiary of the agreement, regardless of who is the nominal employer.

First, the cover page of the PEAP shows the logo of SCI. The logo is the *only* part of the PEAP that names or indicates any particular corporate entity (other than the disclaimer that SCI is the "employer"). Even the admitted nominal employer, SCI Management L.P., is not named or indicated anywhere in the PEAP. Thus, if the arbitrators were confined to the four corners of the PEAP, the only possible corporate party they could identify would be SCI.

Second, it makes no difference in the end whether SCI was the "employer" or the "company" for purposes of arbitration agreement. Assuming SCI Management L.P. was the "employer" and the "company" with whom Mr. Green made the agreement, the agreement applies to all claims against "the Company" *or* "its affiliates." (X-82, sec. 1). There appears to be no dispute that SCI is the parent and affiliate of SCI Management L.P. Thus, the agreement requires Mr. Green to submit his claims against SCI to arbitration.

In sum, the arbitrators agree with the district court that the arbitration provisions of the PEAP apply to this dispute between Mr. Green and SCI.

IV. Timeliness

SCI has asserted an affirmative defense that Mr. Green's SOX claim is untimely. The SOX Act's period of limitations for filing a retaliation claim is 90 days "after the date on which the violation occurs." 18 U.S.C. ' 1514A(b)(2)(D). Mr. Green's administrative complaint to the Department of Labor was clearly within this time limit if the alleged "violation" occurred on the date SCI terminated him. However, SCI maintains that the period of limitations began to run at an earlier date, when Mr. Curtiss informed Mr. Green that he had no future with SCI and no hope of promotion, and that Mr. Green should begin looking for other employment.

It is true that a period of limitations in an employment discrimination or retaliation statute generally begins to run when the employer made and communicated its decision to take adverse action against an employee. *Delaware State College v. Ricks,* 449 U.S. 250, 258-59 (1980). See also 29 C.F.R. ' 1980.103(d). However, the communication to the employee must be "unequivocal." Flannery v. Recording Industry Ass'n of America, 354 F.3d 632 (7th Cir. 2004); Hitt v. Connell, 301 F.3d 240, 246 (5th Cir. 2002); Bailey v. United Airlines, 279 F.3d 194 (3rd Cir. 2002).

Mr. Curtiss's notice to Mr. Green that he had no future with the company and that Mr. Green needed to find other employment may have been

ominous, but it was not an "unequivocal" notice of an actual decision to terminate employment. Mr. Curtiss's statement might simply have meant that there was no possibility of Mr. Green's further advancement in the company, that senior management did not desire him to remain, or that a company decision to terminate was likely to occur at some indefinite time in the future. Mr. Curtiss did not say that Mr. Green was *terminated* or that a decision to terminate him had been made. He merely suggested that such a decision was possible if Mr. Green did not first find alternative employment. Even if Mr. Curtiss had stated that "termination" or a decision to "terminate" was forthcoming or had been made, his statement provided no definite date on which either of these two events might occur.

In contrast, when Mr. Curtiss informed Mr. Green on June 17, 2005, that he was terminated, Mr. Curtiss did provide unequivocal notice of termination. Mr. Green filed his complaint on August 26, 2005, and this date is within 90 days of SCI's unequivocal notice of its decision to terminate Mr. Green.

The arbitrators hold, therefore, that Mr. Green's complaint to the Department of Labor was not untimely.

V. The Merits of Mr. Green's Complaint

A. Elements of Cause of Action and Burden of Proof Under Sarbanes-Oxley

The anti-retaliation provision of the Sarbanes-Oxley Act prohibits an employer from discharging

or otherwise discriminating against an employee "because of any lawful act done by the employee—

> (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, or any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders, when the assistance is provided to or the investigation is conducted by ... a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover or terminate misconduct)...."

18 U.S.C. § 1514A. The SOX Act incorporates by reference the rules of 49 U.S.C. § 42121(b) regarding procedures and allocation of burdens of proof.

Under Section 42121, a complainant bears the initial burden of presenting a prima facie case that protected conduct was a "contributing factor" in the employer's decision to take the challenged adverse employment action against the complainant. Thus, Mr. Green bore the initial burden of proving (1) he engaged in protected conduct described in Section 1514A of the SOX Act, and (2) such conduct was a contributing factor in SCI's decision to terminate his employment.

We begin, therefore, with the question of whether Mr. Green has established that he

engaged in protected conduct by reporting violations of any of the laws listed in Section 1514A. Mr. Green alleges several different reports by him that may have been contributing factors in SCI's decision to discharge him from employment. We note, initially, however, that Mr. Green did not use SCI's prescribed formal channels for making reports about illegal conduct or other irregularities. The SOX Act does not necessarily condition protection on an employee's use of his employer's formal reporting procedures. Nevertheless, an employee's failure to use such procedures may have some bearing on the issue whether he actually made any report at all, or whether he reasonably believed there was something to report.

It is undisputed that Mr. Green did not use either of two formal procedures for reporting illegality. First, an employee might include an "exception" in his quarterly certification to SCI's Disclosure Committee. Although Mr. Green was required to file quarterly certifications, he did not include an exception with respect to any of the irregularities he alleged in his complaint to the Department of Labor. (see X-100-102). Second, Mr. Green did not use the Careline to report any of these alleged irregularities. (See X-98 and 99).

Mr. Green alleges that he did make informal complaints to Mr. Curtiss about a number of irregularities. Mr. Curtiss agrees that Mr. Green frequently complained about a wide range of matters. Indeed, Mr. Curtiss's receipt of Mr. Green's complaints over a period of about five years is arguably more indicative of tolerance than retribution. Moreover, Mr. Curtiss denied that Mr.

Green ever characterized his complaints as involving *illegal* conduct by SCI or officers or other employees of SCI. As recalled by Mr. Curtiss, Mr. Green's complaints involved differences of business judgment, not reports of illegal conduct.

B. Matters Allegedly Reported by Mr. Green

1. **The Letter of Credit.** By all accounts, the precipitating event for Mr. Green's termination was his conflict with Mr. Shelger and Mr. Waltrip in the preparation of the letter of credit in January 2005. In retrospect, this conflict appears to have resulted at least, in part, from a misunderstanding and a clash of personalities. However, even if Mr. Green were correct that Mr. Shelger and Mr. Waltrip acted arbitrarily or unreasonably toward Mr. Green or toward the bank, Mr. Green has failed to demonstrate that he reasonably believed that either Mr. Shelger or Mr. Waltrip was attempting to violate any law, particularly any law within the scope of the protective provisions of the SOX Act.

Mr. Green's primary complaint is that Mr. Shelger demanded improper conditions in the letter of credit. However, it does not appear that there is any basis for believing that Mr. Shelger, SCI or the bank would have been acting illegally by including such conditions in the letter of credit. Rather, it appears that federal law would have made the conditions ineffectual. The difference is important, because a document that is voidable or ineffective is not illegal. It is simply unsuccessful.

Moreover, Mr. Shelger's request for conditions was part of his larger effort to limit SCI's exposure to the risk of fraud by any effectual means. Even

Mr. Green agrees that Mr. Shelger lacked expertise with respect to letters of credit, and that Mr. Shelger needed the assistance of persons who did have such expertise. Mr. Shelger finally obtained such assistance from Mr. Costello and outside counsel, and he agreed to the terms designed and recommended by Mr. Costello and outside counsel. In sum, Mr. Green has not demonstrated that Mr. Shelger violated any law by asking whether certain conditions were possible or by becoming angry to learn they were not possible in the exact manner Mr. Shelger requested.

2. **Stock Repurchase Program**. In his complaint to the Department of Labor, Mr. Green alleged that his report about SCI's stock repurchase program was a contributing factor in his discharge. SCI began a stock repurchase program in August 2004, based on a determination that there was an unexpected amount of cash available to SCI.[16] The surplus of cash was evidently the result of decisions by many convertible bondholders to convert their bonds to shares of stock and not to require repayment of principle.

Mr. Green objected to Mr. Curtiss about SCI's use of these excess funds for a stock repurchase program because he believed SCI was too eager to buy back stock at any price and should use the funds to pay dividends instead. (X-30). In contrast, Mr. Curtiss believed the repurchase program would

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[16] The stock repurchase program is described in the Company's 3-Q-2004 Form 10-Q (X 135, p. 8).

improve shareholder value. (X-33).[17] Over the course of the stock repurchase, SCI paid prices ranging from $5 to $8.70 per share from 2004 to 2005. (X-21). By July 2007 the price of a share was $12.40. Although Mr. Green may have differed with other managers as to whether the stock repurchase was the best use of SCI's cash, he supported the stock repurchase in a presentation before a debt rating agency. (X-32). Mr. Green also differed on how quickly the buy back should occur. (X-23).

Mr. Green's complaint to the Department of Labor (X-94) implied a number of allegations with respect to the stock repurchase program. However, his evidence at the hearing was limited to two matters about which he allegedly complained to Mr. Curtiss. First, Mr. Green alleged that the stock repurchase program was "for the sole purpose of artificially increasing the price of the stock" so that managers would receive higher incentive compensation from SCI's Performance Unit Plan (PUP). The PUP was designed as an alternative to a previous stock option plan. It was based on stock appreciation over a three year period (a performance cycle) relative to a set of "peer" companies.[18]

Of course, any incentive pay system tied to the performance of a company's stock will tend to

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[17] This view was also supported by the President and CEO, Tom Ryan (See X-29).

[18] See X-18. The PUP program was also publicly disclosed in a proxy statement filed on April 11, 2003. (X-130, p. 16).

reward managers for an increase in the price of the company's stock. Mr. Green has not alleged that the PUP, in and of itself, violated any law. Nor would "increasing the price of the stock" constitute a violation of any law cited by Mr. Green. The essence of Mr. Green's position seems to be that corporate managers "artificially" increased the price of SCI shares by using corporate funds to buy back stock. However, the effect of a company's stock repurchasing on the price of stock is not necessarily "artificial" if the company pays less than the real value of the shares it repurchases. In any event, Mr. Green has not shown that he complained about any reasonably perceived illegality in connection with the repurchasing program or about the rewards enjoyed by managers as a result of the repurchasing program or other business decisions.

Second, Mr. Green alleged in this portion of his complaint to the Department of Labor that SCI's managers "artificially" increased the price of its stock by boasting about its debt to capital ratio. Mr. Green's alleged report about SCI's misuse of debt to capital is included under a separate heading in his Department of Labor complaint, and, therefore, we address this alleged report separately below.

3. **Trust Accounting Irregularities.** Mr. Green alleged in his complaint to the Department of Labor that "From early 2003 ... he reported serious problems over the failure to reconcile hundreds of trust accounts."

The trusts described by Mr. Green exist for the purpose of holding payments customers make in advance for future funeral services, and for the provision of "perpetual" cemetery services. The trusts are subject to state regulation, and their character varies depending on state law. In general, as SCI performs promised services, it withdraws a corresponding portion of the prepaid funds from a trust.

The number of trusts expanded rapidly from the 1990s as SCI acquired other firms and properties. The accounting for the trusts during this period of expansion was in many respects inadequate, due in part to shortcomings in SCI's proprietary accounting software, the failure to enter many details into the system during the rapid acquisition phase, and a subsequent change in accounting rules that required that revenue must be recognized when goods or services are provided, and not when sold. SCI began to confront these problems in about 2000 and it began the process of reconciling the accounts in about 2001.[19]

Even by his own accounts, Mr. Green did not become involved in or aware of any aspect of the trust reconciliations until about 2003. At that time, the person primarily responsible for trust reconciliations was Sarah Beaves. Ms. Beaves regularly reported the problems of the reconciliation process in her quarterly

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[19] The 2002 10-K Form refers to an ongoing review of the trust funds (X-129, p. 44).

certifications, and SCI's auditors, Price Waterhouse, were aware of the problems and of the process of reconciliation. [20]

Mr. Green testified that he became aware of the problems regarding the trusts when his subordinate, Eric Bartee, showed him differences between the trust "detail" and the corporate general ledger. At the hearing, however, Mr. Bartee testified that the problems with the trust accounts were "widely known" and not a secret. Indeed, it appears to be undisputed that any of the problems Mr. Green may have described with respect to the trusts were first described to him by other SCI employees, were reported by SCI employees, were known to SCI's auditors, and were subject to an ongoing process of reconciliation.[21]

With respect to the trust accounting problems, we find that Mr. Green did not make a protected report that was a contributing factor in his discharge.

4. **Misleading Debt to Capital Ratios.** In his complaint to the Department of Labor, Mr. Green stated or implied a number of improprieties with respect to SCI's presentation of debt to capital rations. Our discussion is limited to those matters as to which Mr. Green made alleged pre-discharge complaints.

At the hearing, Mr. Green's evidence showed that he complained to Mr. Curtiss about the value

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[20] See, for example, X-7, Beaves 2d Q2003 certification.

[21] See February 26, 2004 Audit Committee minutes. (X-8).

assigned to certain cemetery assets included in SCI's calculation of its capital. Mr. Green argued that the cemetery values were inflated because of the manner in which SCI had purchased these assets during its period of rapid expansion. However, Mr. Curtiss testified that the real issue with respect to these valuations related to a change in accounting rules that occurred about 2003—two years before Mr. Green's discharge. The result of this change in the rules required SCI to reduce values attributed to goodwill with respect to some of the assets in question. Mr. Green has not demonstrated that his reports to Mr. Curtiss involved possible violations of law rather than differences in judgment. In any event, we find that any disagreements between Mr. Green and Mr. Curtiss concerning the valuation of these assets were not contributing factors in Mr. Green's discharge.

At the hearing, Mr. Green testified that he had also questioned and complained about SCI's reliance on debt to capital ratios in presenting its case to rating agencies. Mr. Green believed that a more appropriate gauge of SCI's condition was its debt to tangible capital ratio. Again, however, Mr. Green failed to show that SCI violated the law by preferring to emphasize its debt to capital ratio. Indeed, Mr. Green admitted that there would be no illegality in disclosing the debt to capital ratio to shareholders.

5. Use of Trust Assets. Mr. Green alleged in his Department of Labor Complaint that "Trust assets were used in a manner that benefited friends of corporate officials to the detriment of the

corporation and its stockholders." In particular, Mr. Green alleged that SCI allocated a disproportionate amount of the work of managing the trusts to National Fiduciary Services (NFS), which was owned by a former SCI officer. According to Mr. Green, NFS was the weakest performer but received the highest fees among the trustees serving SCI's trusts.

The evidence at the hearing showed that NFS was once owned by SCI. SCI divested itself of NFS to comply with requirements of state regulatory authorities. Mr. Green believed that NFS received the largest share of trust administration business because its owner maintained a friendship with Mr. Waltrip. However, Mr. Bartee testified that there were few alternative providers for such work because "the margins are so thin." The fees paid to NFS were negotiated without the involvement of Mr. Waltrip and were not high in comparison to fees paid to other trustees, some of whom actually charged higher fees. Moreover, SCI was borrowing the staff of NFS to handle extra obligations, and NFS charged "a few extra points" for this purpose.

Mr. Green testified that in addition to complaining about the relationship with NFS, he arranged for some of NFS's trust work to be moved "in house" at SCI. It is undisputed that SCI eventually determined that some of the work assigned to NFS could more economically be performed by SCI personnel. However, Mr. Bartee testified that bringing this work back to SCI was *his* idea, and that the plan to move work from NFS to SCI took form before Mr. Green became involved with the matter. (X-112).

We find that Mr. Green's alleged report concerning NFS did not constitute a protected action that was a contributing factor in his discharge.

6. **Tax Irregularities.** The last set of protected reports alleged by Mr. Green in his complaint to the Department of Labor involved certain international tax issues. Mr. Green alleged that starting in 2002, "SCI engaged in a scheme to evade Canadian taxes for the issuance of bonds through the Cerebus Trust," and that in 2005, SCI failed to withhold Argentinean taxes from compensation paid to the manager of SCI's Argentinean subsidiary. SCI's chief witness with respect to the alleged tax irregularities was Harry Loring, who was employed by SCI in various capacities with respect to international tax affairs from March 2000 to 2007.

The Cerebus Trust was established in Canada in 1998 as a less expensive form of financing debt. The trust separated interest payments from repayment of principle. SCI purchased a stream of repayments of principle, and Canadian insurance companies purchased a stream of interest payments. The trust ceased operations in 2003 because of changes in Canadian tax law, taking effect in 2004, that required the withholding of taxes on payments to the participating Canadian insurance companies in a manner that diminished the profitability of the trust for the insurance companies. The prospective withholding of taxes would have had the effect of reducing the insurance companies' interest income from the trust.

To prepare for the termination of the trust, SCI endeavored to buy back all the bonds held by the trust before the effective date of the new tax law. Mr. Green became involved in the process of locating the actual owners of the bonds and arranging to buy the bonds back. In the course of this activity, Mr. Green understood Harry Loring to say that SCI needed to be "out" of the trust by the end of 2003 to avoid new "reporting" requirements that might reveal past failure to withhold taxes and the taking of a "double deduction." Neither Mr. Green nor any other witness explained what might be meant by an alleged "double deduction," whether any party had taken an improper deduction, or why new reporting requirements might reveal a double deduction.

Mr. Green testified that he recalled telling Mr. Loring and Mr. Curtiss that they should not be "covering up" this situation. However, Mr. Loring denied that the trust was terminated to avoid discovery of past irregularities. Rather, Canadian law had simply not required withholding until the 2004 change in the law. Mr. Green was correct in alleging that that there was some urgency in terminating the trust before 2004, but the reason for this urgency was that the bonds in the trust needed to be refinanced before 2004 in order to avoid the new withholding requirements. Neither SCI nor the Canadian insurance companies had anything to hide with respect to the trust. The trust had simply become economically unattractive. Mr. Curtiss and Mr. Loring denied that Mr. Green have ever complained to them about possible

violations of the law with respect to the Cerebus trust.[22]

We find that Mr. Green's alleged reports about the Cerebus trust were not contributing factors in his discharge.

Mr. Green's allegations with respect to Argentinean taxes related to the employment of Guido Blohm, who managed SCI's Argentinean operations. Mr. Bloom was as non-resident of the U.S., and he was employed through an Argentinean corporation that paid his compensation and withheld taxes. SCI relied on tax counsel in Argentina to be sure that Mr. Bloom's taxes were properly handled.[23] Mr. Green presented little evidence at the hearing to explain the manner in which SCI violated any law in its handling of Mr. Bloom's compensation or taxes. Mr. Curtiss and Mr. Loring denied that Mr. Green had ever complained to them about illegal activity with respect to Mr. Bloom. We find that Mr. Green's alleged reports about Mr. Bloom were not contributing factors in his discharge.

7. **Other Alleged Reports.** At the hearing, Mr. Green alleged other pre-discharge reports he made concerning irregularities at SCI. These other

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[22] Mr. Curtiss outlined the Company's position and the Canadian tax law change in a December 12, 2003 letter to Mr. Costello at J. P. Morgan Chase (X-117). Thus, it is clear that the Company was not taking any action to cover up the trust termination.

[23] Blohm signed a release and indemnification agreement concerning his taxes. (X-41 and X-42).

alleged reports were not included in Mr. Green's complaint to the Department of Labor.

a. **Corporate Aircraft.** Mr. Green testified that he had complained to Mr. Curtiss about Mr. Waltrip's use of SCI's corporate aircraft to travel to his private ranch, and that the decision to buy a corporate aircraft was not justified. Mr. Curtiss recalled that Mr. Green did question SCI's judgment in purchasing and using the planes, but that Mr. Green had not complained that SCI had acted fraudulently or illegally in this regard.

SCI owns two aircraft to provide more convenient transportation for managers responsible for 2,000 geographically dispersed operations. About 83 to 85 percent of aircraft usage is for business purposes, and 15 to 17 percent has involved personal use. Personal use is authorized by the Board of Directors according to a "time sharing agreement" for officers and directors, but officers or directors who use SCI's aircraft are required to repay SCI according to a cost recovery formula.[24] Eric Tanzberger, who was SCI's CFO at the time of the hearing, testified that Mr. Waltrip's use of the plane was in accordance with the time sharing agreement and that Mr. Waltrip had reimbursed SCI for his use of the plane. Mr. Green offered no evidence to show otherwise. As for Mr. Green's complaint that purchasing corporate aircraft was not a wise use of corporate resources,

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[24] See X-43 to X-49, Board of Director authorizations for personal use of company aircraft and lease agreement with Mr. Waltrip.

Mr. Green's objection appears to have been based on a difference of business judgment and not on any alleged illegality.

b. **Mr. Waltrip's SERP Payout.** Mr. Green alleged that he had complained about an unjustifiably generous discount rate SCI used to calculate a lump sum payout from a retirement plan to Mr. Waltrip.

The plan in question was SCI's Supplementary Executive Retirement Plan (SERP) (X-110). SCI had created the plan many years earlier for senior executives, but SCI had "frozen" the plan at the time of the events in question. The SERP still maintained assets for its participants, including Mr. Waltrip. In about 2003, Mr. Waltrip decided to use funds from his SERP account to repay a loan SCI had provided to him. Thus, he asked for a partial lump-sum payout from the SERP. The payout was approved by SCI's Compensation Committee. However, the early payout required the calculation of a discount rate.

When Mr. Waltrip requested this distribution from his SERP account, Mr. Green was instructed to calculate the discount rate for the distribution. Under the terms of the SERP, the applicable discount rate for that year was 5.48 percent.[25] The plan left no discretion in the selection of a discount rate. Nevertheless, Mr. Green believed the SERP's formula for a discount rate was unreasonably low.

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[25] See X-17, participant settlement agreement signed by Mr. Waltrip.

He calculated a higher rate using a different formula.

At the hearing, Mr. Green admitted he had not reported or complained of any illegality with respect to the SERP plan discount rate. However, he believed that his attempt to use a higher rate might have been reported to Mr. Waltrip because "someone was poisoning my reputation with Mr. Waltrip." Since Mr. Green's use of a higher discount rate did not involve reporting or opposing any activity Mr. Green believed was illegal, his conduct in this regard was not protected by the SOX Act. Moreover, we find that Mr. Green's action with respect to Mr. Waltrip's lump sum payout from his SERP account was not a contributing factor in Mr. Green's discharge.[26]

C. The Letter to the Board of Directors

Lastly, we consider whether Mr. Green's letter to the Board of Directors constituted protected activity under SOX. Apart from any of Mr. Green's other alleged reports of illegal activity, his letter to the directors might stand on its own as a "report." The letter did allege unethical behavior by Mr. Shelger. However, the letter did not allege any illegal conduct. At best, the letter alleged that if the bank and SCI had included Mr. Shelger's conditions in the letter of credit, the resulting letter of credit would not have been in compliance with federal banking regulations. As discussed above, however, including the conditions

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[26] Mr. Waltrip's SERP payout was publicly disclosed in a proxy statement filed in April 2004. (X-132, p. 27).

in the letter of credit would not have violated the law. The conditions simply would have been ineffectual.

The fact that Mr. Green may have been mistaken in his interpretation of the law is not the end of the matter. The prevailing approach in anti-retaliation is to grant protection to a whistleblower who reasonably believes he is reporting illegal conduct, even if his belief later proves to be incorrect. *Wichita County, Texas v. Hart*, 917 S.W.2d 779 (Tex. 1996). Indeed, SOX expressly provides protection for an employee who reports what he "reasonably believes" is a violation. 18 U.S.C. § 1514A(a)(1). However, there are several reasons why we believe Mr. Green's letter to the directors did not include any matter he reasonably believed involved a violation of any law within the scope of SOX.

First, as explained earlier, Mr. Green has failed to show any basis for a belief that Mr. Shelger's conduct violated any of the laws within the scope of SOX. Indeed, he has not shown a reason to believe Mr. Shelger's conduct violated any law, although Mr. Shelger's initial requests of the bank might have created regulatory problems for the bank if the bank had acceded without the solutions subsequently negotiated between SCI and the bank. Mr. Green's allegations raised issues of ethics, civility or business judgment. However, SOX does not protect employees in arguments about ethics, civility or business judgment.

Second, Mr. Green is a lawyer with substantial expertise and experience in letters of credit. Thus, if there were any basis for a theory of illegal conduct by Mr. Shelger with respect to a letter of credit, we would have expected to hear Mr. Green articulate such a theory. See *Wichita County,* 917 S.W.2d at 784-85 (an employee's experience and training is relevant to the inquiry as to the reasonableness and good faith of his alleged belief or suspicion).

Finally, it is relevant that Mr. Green was motivated to use the report mainly to prevent or delay his termination, or to retaliate against Mr. Shelger. In *Wichita County,* the court held that an employee's "malice" in making a report against a supervisor does not disqualify the employee from protection against retaliation. 917 S.W.2d at 784-85. However, if an employee were motivated to "blow the whistle" primarily for personal reasons, and if the report was, in fact, unfounded, there is all the more reason to doubt that the employee's belief in his allegations was reasonable or in good faith.

Mr. Green's personal motive in making the report is relevant for one more reason. A humane employer will not wish to cause unnecessary damage to an employee's career prospects by summary termination, particularly if termination is due to personality conflict. In the instant case, for example, Mr. Curtiss's strategy in resolving the conflict between Mr. Green and upper management was to allow Mr. Green time to look for new employment. However, failing to terminate Mr. Green immediately after the Chinese letter of

credit matter provided Mr. Green an opportunity for a preemptive strike. A rule that barred a court or arbitrator from considering a whistleblower's motive might discourage an employer from giving a problem employee any time at all. Leniency might be repaid with an allegation of wrongdoing asserted simply to create the basis for a lawsuit. This is not to say that an employee's personal motive disqualifies him from protection, only that his motive does bear on the issue whether he had a good faith belief in his allegations, particularly when the allegations prove unfounded.

In sum, although SCI may have been motivated, in part, to terminate Mr. Green because of his complaint to the Board of Directors, we find that Mr. Green's letter to the outside Directors was not protected activity under the SOX Act.

D. Protected Conduct a Contributing Factor?

Under 49 U.S.C. § 42121(b)(2)(B)(i), an employee establishes a prima face case of unlawful retaliation if protected activity was a contributing factor in his discharge or other discrimination. As detailed above, most of the reports described by Mr. Green do not appear to have played any part at all in his termination. Mr. Green's conflict with Mr. Shelger and Mr. Waltrip over the letter of credit, and Mr. Green's deteriorating relationship with other personnel after the letter of credit incident were the causes of his discharge. Mr. Green's letter to the directors may have been a contributing factor in his discharge, but the letter did not constitute a protected report under SOX.

E. Common Law Claims

Mr. Green has also suggested common law claims against SCI for intentional infliction of emotional distress, intentional interference with employment, and discharge in retaliation for refusing to commit an illegal act. We find that Mr. Green has failed to prove a basis for any of these claims.

Mr. Green's claim for wrongful discharge in retaliation for refusing to commit an illegal act is based on *Sabine Pilot Service, Inc. v. Hauck,* 687 S.W.2d 733, 735 (Tex. 1985). In order to prove a cause of action under Sabine Pilot, a plaintiff employee must show that he was discharged solely because of his refusal to obey an order to commit an illegal act. For all of the reasons discussed in connection with our rejection of Mr. Green's SOX claims, we find that Mr. Green was not discharged solely because of his refusal to commit an illegal act.

Mr. Green's claim for intentional infliction of emotional distress requires proof that SCI engaged in outrageous conduct intending to cause, and actually causing, severe emotional distress. Discharging an employee, even for an arbitrary or unfair reason, is not "outrageous" per se. *Wornick Co. v. Casas,* 856 S.W.2d 732, 735 (Tex. 1993). Mr. Green has not proven any other conduct by SCI, apart from his disagreement over the reasons for his discharge, that would make its treatment of him "outrageous." Moreover, Mr. Green did not prove that he has suffered "severe distress." Therefore, we find that SCI is not liable for intentional infliction of emotional distress.

Mr. Green's claim for interference with his employment requires proof that SCI interfered with his relationship with his employer. However, under Texas law, it is doubtful whether a parent corporation can unlawfully interfere with the contract of its wholly owned subsidiary. *American Med. Int'l, Inc. v. Giurintano,* 821 S.W.2d 331 (Tex. App. – Houston [14th Dist.] 1991, no writ); *H.S.M. Acquisitions, Inc. v. West,* 917 S.W.2d 872, 882 (Tex. App. – Corpus Christi 1996, writ denied); *Texas Taco Cabana, L.P. v. Taco Cabana of New Mexico, Inc.,* 304 F. Supp.2d 903, 912 (W.D. Tex. 2003). Moreover, Mr. Green admitted that the subsidiaries that employed him were his "nominal" employers and that SCI was his real employer for most purposes. Under these circumstances, we find that SCI was not "interfering" with Mr. Green's employment with another party. Rather, it was acting to terminate its own relationship with Mr. Green in the only way that it could.

VI. SCI's Counterclaim for Attorney's Fees

Finally, we address SCI's counterclaim for attorney's fees in connection with its defense of the lawsuit in the district court and its efforts to obtain an order compelling arbitration. We find that we lack jurisdiction over this claim. The contractual basis for this arbitration is the PEAP (X-82). Section 1 of the PEAP (*Matters Subject to Arbitration*) states that the parties agree to arbitrate "all disputes relating to any aspect of Employee's *employment* with the Company." (emphasis added). We find that SCI's claim for attorney's fees does not arise from Mr. Green's "employment" with SCI.

It is true, as SCI argues in its brief, that the duty to arbitrate includes claims for "breach of contract," but the PEAP lists "breach of contract" as an example of an "employment" dispute subject to the duty to arbitrate. SCI's claim for attorney's fees may be based on a contract, but it arises from facts that occurred when Mr. Green was no longer an employee of SCI and that do not involve his employment with SCI.

The arbitrators, therefore, decline to decide whether SCI has a claim against Mr. Green for attorney's fees, and we express no opinion with respect to the merits of this claim.

VII. Conclusion and Award

We find that we do have jurisdiction over Mr. Green's employment claims against SCI, and that Mr. Green made a timely complaint to the Department of Labor concerning his SOX claims. We also find, however, that SCI did not violate the SOX Act in discharging Mr. Green, and that Mr. Green has not proven any common law claim against SCI. Finally, we find that we have no jurisdiction over SCI's counterclaim for attorney's fees against Mr. Green.

Issued in Houston, Texas this 29th day of October, 2007:

/S

Richard R. Carlson, Chair

For and on behalf of all other Arbitrators

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PHILIP W GREEN,	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION NO
	§	H-06-833.
SERVICE	§	
CORPORATION	§	
INTERNATIONAL,	§	
Defendant.	§	

OPINION & ORDER CONFIRMING ARBITRATION AWARD

Pending before the court in this employment dispute are Plaintiff Philip W. Green's ("Green's") motion to vacate the arbitration award (Doc. 52) and Defendant Service Corporation International's ("SCI's") response and motion to confirm the arbitration award (Doc. 53). For the reasons that follow, the court DENIES Green's motion to vacate and GRANTS SCI's motion to confirm.

I. Background & Relevant Facts

In March of 2001, Green executed SCI's Principles of Employment and Arbitration Procedures, agreeing to arbitrate all disputes relating to his employment. The agreement states, in relevant part, as follows:

> Employee and the Company agree that all disputes relating to any aspect of Employee's employment with the

> Company shall be resolved by binding arbitration. This includes, but is not limited to, any claims against the Company, its affiliates or their respective officers, directors, employees, or agents for breach of contract, wrongful discharge, discrimination, harassment, defamation, misrepresentation, and emotional distress, as well as any disputes pertaining to the meaning or effect of this Agreement.

(Arbitration Agreement at 1, Doc. 53 Ex. 13).

On March 13, 2006, Green filed the current lawsuit against SCI, claiming that he had been wrongfully discharged in violation of the whistleblower provision of the Sarbanes-Oxley Act if 2002, 18 U.S.C. § 1514A. (See Pl.'s Compl., Doc. 1). SCI filed a motion to compel arbitration, which Green opposed on two grounds: first, he argued that SCI had allegedly waived its right to compel arbitration by defending itself in an administrative proceeding through the Department of Labor; second, he claimed that the arbitration agreement did not apply in this case because the agreement did not specifically identify SCI as the "Company" with whom Green agreed to arbitrate employment disputes.

The court disagreed with both of Green's contentions. (See Order Compelling Arbitration, dated June 30, 2006, Doc. 15). As to Green's first argument, the court held that SCI did not waive its right to arbitrate the employment disagreement by

invoking the administrative process though the process may have been similar to the judicial process. (*See id.* at 2-3) (relying primarily on *Brennan v. King*, 139 F.3d 258 (1st Cir. 1998)). With respect to Green's second argument, the court found that the agreement specifically identified SCI on its cover such that the court could infer that the arbitration agreement referred to SCI. (Id. at 3).

Green filed a motion for reconsideration, which raised two objections: (1) that no contract existed compelling arbitration of Green's claims against SCI; and (2) that the court misinterpreted *Brennan v. King*. The court again disagreed. (*See* Order Denying Motion to Reconsider, dated August 17, 2006, Doc. 29). Particularly relevant is the court's findings regarding the contract:

> Green rests his argument that no contract exists on the fact that the arbitration agreement that he signed fails to identify, explicitly, the other party to be bound by the contract. The space in which that party should have been identified is blank. Green cites no authority suggesting that such an omission renders the contract void. The context of the agreement makes clear which party is bound: the party employing Green. No other interpretation of the omission is possible. Green knows who employed him and knows that his employer was an affiliate of SCI. Green's complaint alleged that he was employed by SCI. SCI's answer denied this allegation

> and states that a subsidiary of SCI, SCI Funeral and Cemetery Purchasing Cooperative, Inc. employed Green.
>
> The arbitration agreement itself compels Green to arbitrate any disputes not only with his employer, but also with any of the employer's affiliates. SCI, the Defendant, is an affiliate of Green's employer, SCI Funeral and Cemetery Purchasing Cooperative, Inc. More importantly, no portion of the court file suggests that Green was not employed by an affiliate of SCI. Thus, no matter who employed Green, he is bound to arbitrate a dispute with SCI.

(*Id.* at 1-2) (internal citations to the record omitted). As such, the court granted SCI's motion to enforce the Order Compelling Arbitration and ordered Green to either (1) begin the arbitration process pursuant to the terms of the March 6, 2001, arbitration agreement, or (2) face dismissal with prejudice of his claims against SCI. (*See* Order, dated August 18, 2006, Doc. 30). Green immediately filed an appeal of the court's June 30, 2006, and August 18, 2006, Orders with the Fifth Circuit.

On December 14, 2006, an arbitration panel convened pursuant to this court's August 18, 2006, Order. (*See* Order, Doc. 53 Ex. 3). Three arbitrators were chosen in accordance with the procedures outlined in the arbitration agreement:

Green selected Patrick M. Flynn, SCI selected A. Martin Wickliff, and Mr. Flynn and Mr. Wickliff selected Richard R Carlson. (*See id.*). Mr. Flynn and Mr. Wickliff are both practicing attorneys in Houston, Texas, and are board certified in Labor & Employment law by the Texas Board of Legal Specialization. Professor Carlson is a professor of labor law, employment law, and contract law at South Texas College of Law. Hereinafter, the court shall refer to Mr. Flynn, Mr. Wickliff, and Professor Carlson as the "Arbitrators."

Shortly after the panel convened, Green filed a special appearance and a motion to dismiss in which he argued, *inter alia*, that the Arbitrators lacked jurisdiction to hear the case because no binding arbitration agreement existed for his claims against SCI. (Special Appearance of Philip W. Green and Motion to Dismiss, December 21, 2006, Doc. 53 Ex. 6). The Arbitrators rejected Green's argument and held, in pertinent part, as follows:

> The district court's order compels the parties to arbitrate, and it resolves the issue whether Mr. Green's claim against SCI is subject to arbitration. It is expected that the Fifth Circuit may issue a further decision in this regard. However, subject to further action by the Fifth Circuit, the arbitration of Mr. Green's claim against SCI shall proceed.

(Arbitrators' Letter Ruling, dated February 27,

2006, Doc. 53 Ex. 7).[1]

In June of 2007, a five-day arbitration proceeding was held in this matter. Although participating in the arbitration, Green continued to deny the panel's jurisdiction to hear the case.

On October 29, 2007, the Arbitrators issued an award ("Arbitrators' Award") finding that SCI did not violate the Sarbanes-Oxley Act or certain other common law torts in discharging Green. (*See* Arbitrators' Award at 26, Doc. 53 Ex. 2). With respect to jurisdiction, the Arbitrators found that they were bound by this court's determination that the arbitration agreement signed by Green was binding as to his dispute with SCI. (*Id.* at 11-13). Moreover, the Arbitrators independently agreed, on similar grounds, with this court's determination that the arbitration agreement signed by Green applied to his claim against SCI. (*Id.* at 13-14). The Arbitrators found that (1) if they were confined to the four corners of the arbitration agreement, the only corporate entity identified in the agreement is SCI; and (2) that even if "Company" referred to Green's nominal employer and not SCI, the agreement still applied to Green's claims against SCI because the agreement expressly applies to claims against either the "Company" *or* "its affiliates" and no dispute existed that Green's nominal employer was an affiliate of SCI. (*Id.*).

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1 On May 30, 2007, pursuant to 9 U.S.C. § 16(b), the Fifth Circuit dismissed Green's appeal for lack of jurisdiction as this court expressly denied Green's request that the case be dismissed rather than stayed. *Green v. Service Corp. Int'l*, No. 06-20732 (5th Cir. May 30, 2007) (unpublished).

After the Arbitrators' Award issued, Green filed a request to modify the award based, in part, on his contention that the arbitration agreement did not apply to his claims against SCI. (Request to Modify the Award, dated November 8, 2007, Doc. 53 Ex. 11). The Arbitrators denied Green's request in its entirety. (Arbitrators' Letter Ruling, dated November 12, 2007, Doc. 53 Ex. 12).

On January 25, 2008, Green filed his motion to vacate the Arbitration Award on the basis that the Arbitrators exceeded their authority in following this court's orders compelling arbitration and in independently determining that the arbitration agreement applied to his claims against SCI. SCI filed its response and motion to confirm, arguing that the Arbitrators acted completely within their powers and the Arbitrators' Award should be confirmed.

II. Standard of Review

Courts in the Fifth Circuit accord extraordinary deference to arbitration decisions. *See Sarofim v. Trust Co.*, 440 F.3d 213, 216 (5th Cir. 2006). "If an award if rationally inferable from the facts before the arbitrator, the award must be affirmed." *Kergosian v. Ocean Energy Inc.*, 390 F.3d 346, 353 (5th Cir. 2004) (citing *Antwine v. Prudential Bache Securities, Inc.*, 899 F.2d 410, 412 (5th Cir. 1990)). The Fifth Circuit recognizes only six narrow bases upon which an arbitration award may be vacated: four statutory and two non-statutory. The four statutory bases under the Federal Arbitration Act ("FAA") include:

(1) where the award was procured by

> corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a)(1)-(4). Additionally, an award should be vacated if it displays manifest disregard for the law or is contrary to public policy. *Kergosian*, 390 F.3d at 353. The burden of proof is on the party moving to vacate an arbitration award. *Lummus Global Amazonas, S.A. v. Aguaytia Energy Del Peru, S.R. Ltda.*, 256 F. Supp. 2d 594, 604 (S.D. Tex. 2002) (citing *Spector v. Torenberg*, 852 F. Supp. 201, 206 (S.D.N.Y. 1994)).

III. Discussion

Green does not challenge the merits of the Arbitrators' ruling. Rather, he contends that this court erred in compelling Green to arbitrate his claims against SCI and that the Arbitrators exceeded their powers under section 10(a)(4) by following this court's orders. Neither argument has merit because (1) as the court has already

determined, the arbitration agreement applies to Green's dispute with SCI; and (2) the Arbitrators did not exceed their powers in either following this court's orders or by determining that the arbitration agreement applied to Green's dispute with SCI.

1. Green expressly agreed to arbitrate any employment disputes with SCI.

The court has twice ruled that the arbitration agreement in this case applies to Green's claims against SCI. Assuming the merits of the arbitrability issue have not been foreclosed by the court's previous determinations, the court remains unconvinced by Green's arguments that SCI is not a party to the arbitration agreement. SCI's logo is affixed to the title page and is the only corporate entity specifically identified. More importantly, however, Green does not dispute that SCI is affiliated with his nominal employer and is a direct beneficiary of the agreement at issue. The arbitration agreement specifically requires that Green arbitrate "*all* disputes related to any aspect of [his] employment with the Company[,]" and "[t]his include[s], but is not limited to, any claims against the Company, *its affiliates* or their respective officers, directors, employees, or agents . . ." (Arbitration Agreement at 1, Doc. 53 Ex. 13) (emphasis added). The arbitration agreement clearly applies to Green's claims against SCI in this case.

2. The Arbitrators did not exceed their powers.

First, the Arbitrators did not exceed their powers by following this court's orders compelling

arbitration. The Arbitrators were expressly authorized by this court's orders to arbitrate Green's claims against SCI. Green fails to cite any authority for his contention that arbitrators exceed their powers in following a district court's orders compelling arbitration. Vacatur of the Arbitrators' Award on this basis is, therefore, unwarranted.

Second, the arbitrators did not exceed their powers by independently considering the issue of arbitrability and concluding that Green was required to arbitrate his claims against SCI. Arbitrators "excee[d] their powers," under section10(a)(4) when they render decisions not drawn from the essence of the agreements before them. This "essence test" has been described as "rather metaphysical." *Executone Inf. Sys. v. Davis*, 26 F.3d 1314, 1324 (5th Cir. 1994). Under the essence test, an arbitration decision will not be vacated if it is "rationally inferable" from the agreement between the parties and the facts presented to the arbitrators. *Brabham v. A.G. Edwards & Sons*, 376 F.3d 377, 384 (5th Cir. 2004). Here, the Arbitrators' construction of the arbitration agreement is, at the very least, rationally inferable from the agreement. The broad language relating to the arbitrability of claims not only against the "Company" but also any affiliates" provides a rational basis for concluding that the arbitration agreement applied under the undisputed facts in this case. That Green ultimately disagrees with the Arbitrators' interpretation, as well as this court's interpretation, of the agreement does not provide an adequate basis for finding that the Arbitrators'

exceeded their powers in determining that the arbitration agreement applied to Green's claims against SCI.

IV. Conclusion

As Green has not identified any applicable statutory or non-statutory basis for vacating the Arbitrators' Award in this case, the Award must be confirmed. Accordingly, and for the reasons explained above, it is hereby

ORDERED that Plaintiff Green's Motion to Vacate the Arbitration Award (Doc. 52) is DENIED;

ORDERED that Defendant Service Corporation International's Response in Opposition to Plaintiff Green's Motion to Vacate the Arbitration Award and Defendant's Motion to Confirm the Arbitration Award (Doc. 53) is GRANTED; and it is further

ORDERED that the Arbitration Award, dated October 29, 2007, is hereby CONFIRMED.

SIGNED at Houston, Texas, this 25th day of August, 2008.

s/

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PHILIP W GREEN, Plaintiff,	§	
VS.	§	CIVIL ACTION NO. H-06-833
SERVICE CORPORATION INTERNATIONAL, Defendant.	§	

ORDER DENYING MOTION TO RECONSIDER

The Plaintiff, Philip W. Green, asks this court to reconsider its decision to compel arbitration. Doc. 16. The Defendant, Service Corporation International (SCI), has filed a response. Doc. 18, and there have been a slew of replies, surreplies, and rejoinders. Docs. 22, 25, 26, 27, and 28. The Plaintiff's motion is DENIED.

Green raises two objections. First, he argues that no contract exists compelling him to arbitrate his claims. Second, he argues that this case misinterpreted *Brennan v. King,* 139 F.3d 258 (1st Cir.).

Green rests his argument that no contract exists on the fact that the arbitration agreement that he signed fails to identify, explicitly, the other party to be bound by the contract. The space in which that

party should have been identified is blank. Green cites no authority suggesting that such an omission renders the contract void. The context of the agreement makes clear which party is bound: the party employing Green. No other interpretation of the omission is possible. Green knows who employed him and knows that his employer was an affiliate of SCI. Green's complaint alleged that he was employed by SCI. Doc. 1, ¶3.7. SCI's answer denied this allegation and states that a subsidiary of SCI, SCI Funeral and Cemetery Purchasing Cooperative, Inc. employed Green. Doc. 7, ¶15.

The arbitration agreement itself compels Green to arbitrate any disputes not only with his employer, but also with any of the employer's affiliates. SCI, the Defendant, is an affiliate of Green's employer, SCI Funeral and Cemetery Purchasing Cooperative, Inc. More importantly, no portion of the court file suggests that Green was not employed by an affiliate of SCI. Thus, no matter who employed Green, he is bound to arbitrate a dispute with SCI.

Second, Green distinguishes the facts of a case decided by the First Circuit, *Brennan v. King,* 139 F.3d 258 (1st Cir.) from the facts of this case. However, nothing in the case law governing when parties must submit a dispute to arbitration makes the facts that Green cited material. Certainly, Green engaged in a process that resembles the judicial process quite closely, but he did not actually engage in the judicial process. No case law states that invoking a process that resembles the

judicial process operates as a waiver of the right to compel arbitration.

SIGNED at Houston, Texas, this 17th day of August, 2006.

s/

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PHILIP W GREEN,	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION NO
	§	H-06-833.
SERVICE	§	
CORPORATION	§	
INTERNATIONAL,	§	
Defendant.	§	

ORDER COMPELING ARBITRATION

Before the court is a motion to compel arbitration brought by the Defendant, Service Corporation International (SCI). Doc. 8. The Plaintiff, Philip W. Green (Green), has filed a response. Doc. 10. The parties have also filed a number of subsequent documents elaborating on and supplementing their arguments. Doc. 11, Doc. 12, Doc. 13 and Doc. 14. The motion of SCI is GRANTED. Doc. 8.

On March 6, 2001, Green executed an agreement with SCI to arbitrate all disputes relating to his employment. Doc. 8, Exh. A. Green does not deny that this agreement would bind him to arbitrate his dispute, except that he claims SCI waived its right to compel arbitration by defending itself in an administrative proceeding through the Department of Labor (USDOL).

In a letter dated June 17, 2005, Green's attorney offered to conduct informal discussions of the claims. Doc. 10-3. SCI agreed in a letter dated June 27, 2005. Doc. 10-4. Following those discussions, SCI sent a letter dated July 18, 2005 in which it stated that Green would have to arbitrate any dispute. Doc. 10-5. Through a letter dated July 27, 2005, Green responded, claiming that he did not agree that he was limited to seeking relief only through an arbitration proceeding, but agreed to "participate in arbitration, with the understanding that by doing so he [would] not [be] voluntarily foregoing any other means of relief he might have under the law." Doc. 10-6. Through a letter dated August 26, 2005 and described as a "Complaint of Discrimination," Green sought to begin administrative proceedings through the USDOL. Doc. 10-8. Later, Green objected to an investigator's findings and requested a hearing. Doc. 10-10. They also conducted discovery. Doc. 10-14 through Doc. 10-20.

The Supreme Court has held, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25 (1983). Accordingly, the Fifth Circuit has held, "[w]aiver [of the right to compel arbitration]will be found when the party seeking arbitration substantially invokes

the judicial process to the detriment or prejudice of the other party." *Subway Equipment Leasing Corp. v. Forte,* 169 F.3d 324, 326 (5th Cir. 1999) (quoting *Miller Brewing Co. v. Fort Worth Distrib. Co.,* 781 F.2d 494, 497 (5th Cir.1986)). When determining whether a party has waived an arbitration provision, "[t]here is a strong presumption against waiver of arbitration." *Id.*

Although the Fifth Circuit has not determined whether administrative proceedings are the equivalent of judicial proceedings for the purpose of determining whether a party waived its right to compel arbitration, the First Circuit has addressed the issue and held, "it is to judicial, rather than administrative, proceedings that we look to determine whether such waiver has occurred." *Brennan v. King,* 139 F.3d 258, 264 (1st Cir. 1998) (citing *Sevinor v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 807 F.2d 16, 18 (1st Cir. 1986)). The *Brennan* court did not explain how judicial proceedings differed from administrative proceedings and *Sevinor* did not address the difference between judicial and administrative proceedings, but only whether the party seeking to avoid arbitration had suffered prejudice. However, all doubts must be resolved in favor of arbitrating a dispute. Accordingly, this court accepts the result in *Brennan* and holds that SCI did not invoke the judicial process even though it may have used an administrative process similar to the judicial process.

Furthermore, SCI attempted to persuade Green

to arbitrate his dispute. Green chose to disregard the letters from SCI unless it met his conditions. Thus, any prejudice that he suffered by pursuing administrative proceedings was self-inflicted and, therefore, is not actually the prejudice from which courts should protect parties.

Green also argues that it is not clear that the arbitration agreement applied to him. Doc. 10 at 8. Specifically, he claims that SCI did not identify itself as the party who could enforce the arbitration agreement. However, Green's argument is merely that the arbitration agreement was ambiguous. The court looks to the cover of the agreement to find the identity of the party bound by it. Even though SCI is not identified by its legal name, any ambiguity must be resolved in favor of creating a binding arbitration agreement. Thus, this court must infer that the arbitration agreement referred to SCI and that Green accepted a binding arbitration agreement.

Finally, Green asks that this case be dismissed, rather than stayed. However, district courts should stay, rather than dismiss cases governed by arbitration provisions. 9 U.S.C.A. § 3; *Mire v. Full Spectrum Lending Inc.,* 389 F.3d 163 (5th Cir. 2004). In fact, even if this court were to close the case, Green would not be entitled to appeal the decision as a final judgment. *Id;* and *CitiFinancial Corp. v. Harrison,* --- F.3d ----, 2006 WL 1644828 (5th Cir. 2006). Furthermore, and contrary to Green's concerns, leaving a case open, or closing it administratively, does not permit either party to

relitigate the issues upon the conclusion of the arbitration proceedings. Instead, once a district court has compelled the parties to arbitrate their dispute, it has nothing left to do but enter a judgment confirming the arbitrator's award. *CitiFinancial* , 2006 WL 1644828 (citing *Green Tree Financial Corp.-Alabama v. Randolph,* 531 U.S. 79, 86 (2000), *Digital Equipment Corp. v. Desktop Direct, Inc.,* 511 U.S. 863, 867 (1994); *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 467 (1978)). Thus, this court will stay Green's proceedings and compel arbitration.

Because SCI did not use the judicial process and Green did not suffer any prejudice this courts holds that Green is bound to arbitrate his dispute with SCI. Accordingly, it is hereby ORDERED that the motion of SCI is GRANTED. The parties shall resolve their dispute through binding arbitration according to the agreement. Doc. 8. It is further ORDERED that the case is hereby STAYED and ADMINISTRATIVELY CLOSED pending a motion by either party for further judicial intervention.

SIGNED at Houston, Texas, this 30th day of June, 2006.

s/

MELINDA HARMON
UNITED STATES DISTRICT JUDGE